Supreme Court, U.S.
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No. 13-___

IN THE

Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For certain state-law tort actions involving environmental harms, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) preempts the state statute of limitations' commencement date and replaces it with a delayed commencement date provided by federal law. Specifically, 42 U.S.C. § 9658 provides that if "the applicable limitations period for such an action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute." *Id.* § 9658(a)(1). Section 9658, in turn, defines "applicable limitations period"—i.e., the state laws to which § 9658 applies—to "mean[] the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought." *Id.* § 9658(b)(2).

In this case, the United States Court of Appeals for the Fourth Circuit deepened a split in the state and federal appellate courts by interpreting § 9658 to preempt not just state *statutes of limitations* but also state *statutes of repose*. A statute of limitations extinguishes a claimant's right to pursue a cause of action after a certain period of time following accrual, whereas a statute of repose abolishes a cause of action as to a particular defendant after a period of time, regardless of whether the claim has accrued.

The question presented is: Did the Fourth Circuit correctly interpret 42 U.S.C. § 9658 to apply to state statutes of repose in addition to state statutes of limitations?

PARTIES TO THE PROCEEDING

The plaintiffs in this case are Respondents Peter Waldburger, Sandra Ratcliffe, Lee Ann Smith, Tom Pinner, IV, a/k/a Bud Pinner, IV, Hans Momkes, Wilma Momkes, Walter Dockins, Jr., Autumn Dockins, William Clark Lisenbee, Dan Murphy, Lori Murphy, Robert Aversano, Daniel L. Murphy, Laura A. Carson, Glen Horecky, Gina Horecky, Renee Richardson, David Bradley, Byron Hovey, Ramona Hovey, Peter Tatum MacQueen, IV, Bethan MacQueen, Patricia Pinner, Tom Pinner, III, a/k/a Buddy Pinner, III, and Madeline Pinner.

The defendant is Petitioner CTS Corporation.

CORPORATE DISCLOSURE STATEMENT

Petitioner CTS Corporation is a publicly held corporation. It does not have any parent corporations. GAMCO Asset Management, Inc., a wholly owned subsidiary of GAMCO Investors, Inc., owns 10% or more of CTS Corporation's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 14

I. THE FOURTH CIRCUIT'S DECISION DEEPENS A CONFLICT IN THE STATE AND FEDERAL APPELLATE COURTS 14

II. THE FOURTH CIRCUIT'S DECISION RAISES AN IMPORTANT AND RECURRING LEGAL ISSUE 18

III. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CASE LAW 22

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED 27

CONCLUSION 29

APPENDIX A: Opinion of the United States Court of Appeals for the Fourth Circuit 1a

TABLE OF CONTENTS
(continued)

Page

APPENDIX B: Opinion of the United States District Court for the Western District of North Carolina 37a

APPENDIX C: Memorandum and Recommendation of the United States District Court for the Western District of North Carolina 40a

APPENDIX D: Complaint 48a

TABLE OF AUTHORITIES

Page(s)

CASES

A.S.I., Inc. v. Sanders,
835 F. Supp. 1349 (D. Kan. 1993) 21

Abrams v. Ciba Specialty Chems. Corp.,
659 F. Supp. 2d 1225 (S.D. Ala. 2009) 19, 21

Altria Grp., Inc. v. Good,
555 U.S. 70 (2008)..... 27

Anderson v. United States,
669 F.3d 161 (4th Cir. 2011) 19

Bates v. Dow Agrosciences LLC,
544 U.S. 431 (2005)..... 27

Bolick v. Am. Barmag Corp.,
293 S.E.2d 415 (N.C. 1982) 23, 24

Bond v. United States,
131 S. Ct. 2355 (2011)..... 19

Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.,
419 F.3d 355 (5th Cir. 2005) .....*passim*

Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.,
489 A.2d 413 (Del. 1985) 24

Clark Cnty. v. Sioux Equip. Corp.,
753 N.W.2d 406 (S.D. 2008) 17, 21

Coleman v. H.C. Price Co.,
No. 11-2937, 2013 WL 64613
(E.D. La. Jan. 4, 2013)..... 21

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976)..... 23

TABLE OF AUTHORITIES
(continued)

Page(s)

Evans v. Walter Indus., Inc.,
579 F. Supp. 2d 1349 (N.D. Ala. 2008) 22

First United Methodist Church of Hyattsville v. U.S. Gypsum Co.,
882 F.2d 862 (4th Cir. 1989) 7

Fisher v. Ciba Specialty Chem. Corp.,
No. 03-0566, 2007 WL 2995525
(S.D. Ala. Oct. 11, 2007) 21

German ex rel. Grace v. CSX Transp., Inc.,
510 F. Supp. 2d 630 (S.D. Ala. 2007) 22

Gregory v. Ashcroft,
501 U.S. 452 (1991)..... 19

Hillsborough Cnty. v. Automated Med. Labs., Inc.,
471 U.S. 707 (1985)..... 26, 27

In re Erickson,
815 F.2d 1090 (7th Cir. 1987)..... 26

J.H. Westerman Co. v. Fireman's Fund Ins. Co.,
499 A.2d 116 (D.C. 1985)..... 23

James Ferrera & Sons, Inc. v. Samuels,
486 N.E.2d 58 (Mass. App. Ct. 1985) 23

Kucana v. Holder,
558 U.S. 233 (2010)..... 25

Lamb v. Wedgewood S. Corp.,
302 S.E.2d 868 (N.C. 1983) 6, 24

McDermott Int'l, Inc. v. Wilander,
498 U.S. 337 (1991)..... 23, 24

TABLE OF AUTHORITIES
(continued)

Page(s)

McDonald v. Sun Oil Co.,
423 F. Supp. 2d 1114 (D. Or. 2006) 17, 21

McDonald v. Sun Oil Co.,
548 F.3d 774 (9th Cir. 2008) ..... *passim*

Mechler v. United States,
No. 12-1183, 2013 BL 205882
(D. Kan. Aug. 2, 2013) 19, 21

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 14, 26

Molzof v. United States,
502 U.S. 301 (1992) 22

Moore v. Walter Coke, Inc.,
No. 2:11-cv-1391-SLB, 2012 WL 4731255
(N.D. Ala. Sept. 28, 2012) 22

Neblett v. Hanover Inspection Serv., Inc.,
No. COA06-1676, 2007 WL 2701349
(N.C. Ct. App. Sept. 18, 2007) 29

Rapanos v. United States,
547 U.S. 715 (2006) 25

Raygor v. Regents of the Univ. of Minn.,
534 U.S. 533 (2002) 20, 27

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 26

Rodriguez v. United States,
480 U.S. 522 (1987) (per curiam) 26

Safeco Ins. Co. of Am. v. Burr,
551 U.S. 47 (2007) 23

TABLE OF AUTHORITIES
(continued)

Page(s)

Simmons v. United States,
421 F.3d 1199 (11th Cir. 2005) (per curiam) 20

Tipton & Young Constr. Co. v. Blue Ridge Structure Co.,
446 S.E.2d 603 (N.C. Ct. App. 1994) 7

United States v. Charter Int'l Oil Co.,
83 F.3d 510 (1st Cir. 1996) 19

United States v. Kubrick,
444 U.S. 111 (1979) 24

Univ. Eng'g Corp. v. Perez,
451 So.2d 463 (Fla. 1984) (per curiam) 23

Waldburger v. CTS Corp.,
2013 WL 3455775 (4th Cir. July 10, 2013) 20

Wilson v. McLeod Oil Co.,
398 S.E.2d 586 (N.C. 1990) 29

Wyoming v. Oklahoma,
502 U.S. 437 (1992) 20

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1367(d) 20

42 U.S.C. § 9651 8

42 U.S.C. § 9658 ..... *passim*

N.C. Gen. Stat. § 1-52(16) ..... *passim*

OTHER AUTHORITIES

Black's Law Dictionary 1546 (9th ed. 2009) 9

54 C.J.S. *Limitations of Actions* § 4 (1987) 23

TABLE OF AUTHORITIES
(continued)

Page(s)

H.R. Conf. Rep. No. 99-962, 2d Sess. 262, *reprinted in* 1986 U.S.C.C.A.N. 3276 ..... 16, 26

Andrew P. Morriss & Roger E. Meiners, *The Destructive Role of Land Use Planning*, 14 Tulane Envtl. L. J. 95 (2000)..... 19

Restatement (Second) of Torts § 899 (1979)..... 24

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-36a) is reported at ___ F.3d ___. The unreported decision of the United States District Court for the Western District of North Carolina (Pet. App. 37a-39a) is available at 2012 WL 380053. The unreported memorandum and recommendation of the magistrate judge (Pet. App. 40a-47a) is available at 2011 WL 7153937.

JURISDICTION

The Fourth Circuit issued its opinion reversing the district court's final judgment on July 10, 2013. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) at issue in this case provides in full:

(a) State statutes of limitations for hazardous substance cases

> (1) Exception to State statutes — In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(2) State law generally applicable — Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

(3) Actions under section 9607 — Nothing in this section shall apply with respect to any cause of action brought under section 9607 of this title.

(b) Definitions — As used in this section—

(1) Subchapter I terms — The terms used in this section shall have the same meaning as when used in subchapter I of this chapter.

(2) Applicable limitations period — The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

(3) Commencement date — The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general — Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

> (B) Special rules — In the case of a minor or incompetent plaintiff, the term "federally required commencement date" means the later of the date referred to in subparagraph (A) or the following:
>
> (i) In the case of a minor, the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed.
>
> (ii) In the case of an incompetent individual, the date on which such individual becomes competent or has had a legal representative appointed.

42 U.S.C. § 9658.

STATEMENT OF THE CASE

A. This case concerns 42 U.S.C. § 9658, a unique federal provision that engrafts a special *federal* commencement date onto the running of *state* statutes of limitations governing *state* causes of action. This federal intrusion into state procedural law applies to any state action for "personal injury, or property damages" that arises from a "hazardous substance, or pollutant or contaminant, released into the environment from a facility." *Id.* § 9658(a)(1). For these qualifying state-law actions, § 9658 preempts the state commencement dates that would have otherwise applied under the state statutes of limitations, and provides a federal commencement date. Specifically, if the "applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the

date specified in such State statute." *Id.* And § 9658 defines the "applicable limitations period" that it covers as the "period specified in a statute of limitations during which" the qualifying state claims may be brought. *Id.* § 9658(b)(2).

The federal commencement date that § 9658 provides for these state-law claims is an "enhanced discovery rule." Pet. App. 34a. Like North Carolina, most states have statutes of limitations that begin to run when the plaintiff's "bodily harm" or "physical damage" "becomes apparent or ought reasonably to have become apparent to the" plaintiff. N.C. Gen. Stat. § 1-52(16). In place of these triggering events, § 9658 delays the commencement of the state statutes of limitations until "the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. 9658(b)(4)(A). Accordingly, this federal discovery rule does not trigger the state statute of limitations until the plaintiff knows of (or reasonably should have known of) *both* the injury *and* the causal connection between the injury and the alleged hazardous substance at issue.

B. According to the complaint's allegations, over several decades, CTS of Asheville, Inc., operated a plant in Asheville, North Carolina, that manufactured electronic components. Pet. App. 51a. As part of the manufacturing process, CTS of Asheville used and stored various toxic solvents at the plant. *Id.* In 1983, CTS of Asheville was dissolved, and Petitioner CTS Corporation took over the plant's operations under its Asheville Division. *Id.* at 52a. CTS Corporation operated the plant for two years, and eventually

sold the property in 1987. The buyer then sold the unimproved portion of the property to a developer that built houses on the mountainside overlooking the former plant site. Pet. App. 53a-54a. Respondents—a group of individuals that purchased houses on or near the former CTS property—"contend that their land and ground water is contaminated by the toxic chemicals . . . that CTS Corporation left at the Facility when it sold the property." *Id.* at 41a.

In February 2011, Respondents brought a one-count complaint against CTS Corporation alleging that it had violated North Carolina's nuisance law. *Id.* at 55a-57a. Respondents sought monetary damages and a judgment requiring CTS Corporation to engage in reclamation of the toxic solvents and remediation of the environment around the former plant site. *Id.* at 57a. CTS Corporation moved to dismiss the complaint on the ground that North Carolina's 10-year statute of repose had eliminated Respondents' nuisance claim long before they brought this suit.

A magistrate judge recommended that the district court grant CTS Corporation's motion to dismiss. Pet. App. 40a. The magistrate initially noted that a 3-year statute of limitations governs North Carolina nuisance claims, and begins to run once "'bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant.'" Pet. App. 43a (quoting N.C. Gen. Stat. § 1-52(16)). A 10-year statute of repose also applied to these claims, however, which indicates that "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." Pet. App.

44a (quoting N.C. Gen. Stat. § 1-52(16)). Because "[t]he last possible act or omission by Defendant CTS Corporation that could give rise to a cause of action occurred in 1987 when it sold the property," the magistrate reasoned, Respondents' nuisance claim was "barred by the statute of repose contained in N.C. Gen. Stat. § 1-52(16)." *Id.*

The magistrate rejected Respondents' two arguments for avoiding this statute of repose. The magistrate disagreed with Respondents' contention that the 10-year statute of repose violated the North Carolina Constitution's "open courts provision." Pet. App. 44a. "North Carolina courts have upheld shorter statute[s] of repose[] for other causes of action," the magistrate explained, and the 10-year limit is "not so short as to effectively abolish all potential claims." Pet. App. 45a (citing *Lamb v. Wedgewood S. Corp.*, 302 S.E.2d 868 (N.C. 1983)).

More relevant here, the magistrate also rejected Respondents' position that § 9658 engrafts its federally mandated commencement date not simply onto North Carolina's 3-year statute of limitations but also onto its 10-year statute of repose. Pet. App. 46a. Relying on the Fifth Circuit's decision in *Burlington Northern & Santa Fe Railway Co. v. Poole Chemical Co.*, 419 F.3d 355, 362-63 (5th Cir. 2005), the magistrate reasoned that "[t]he clear language of the statute . . . is limited to a state's statute of limitations," not a state's statute of repose. Pet. App. 46a.

The magistrate noted the well-known substantive differences between the two types of statutes. On the one hand, "'[a] statute of repose is a substantive limitation, and is a condition precedent to a party's right to maintain a lawsuit.'" Pet. App. 47a (quoting *Tip-*

ton & Young Constr. Co. v. Blue Ridge Structure Co., 446 S.E.2d 603, 605 (N.C. Ct. App. 1994)). On the other, a statute of limitations is a "'procedural device that operates as a defense to limit the remedy available from an existing cause of action.'" *Id.* (quoting *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 865 (4th Cir. 1989)).

The district court subsequently adopted the magistrate's recommendation and entered final judgment for CTS Corporation. Pet. App. 39a. The court described the "magistrate judge's analysis of CERCLA's preemption of state statutes of limitations, as opposed to statutes of repose" as "accurate and well-reasoned." Pet. App. 39a. And the court found the Ninth Circuit's contrary holding—that CERCLA preempted both statutes of limitation and statutes of repose—to be "flawed." *Id.* (disagreeing with *McDonald v. Sun Oil Co.*, 548 F.3d 774, 778 (9th Cir. 2008)). Section 9658's plain language applies only to state statutes of limitations, the court explained, so the "*McDonald* court created an ambiguity where none existed." *Id.*

C. A divided panel of the Fourth Circuit reversed. Pet. App. 1a. The majority held that "the discovery rule articulated in § 9658 . . . preempts North Carolina's ten-year limitation" in N.C. Gen. Stat. § 1-52(16). Pet. App. 2a. It began with a historical summary of how § 9658 came to be. Congress passed CERCLA in 1980 against the backdrop of well-publicized environmental disasters. Pet. App. 2a-3a. The majority thus described CERCLA as "a remedial statute" designed to abate hazardous-waste sites and to shift the costs of cleanup to responsible parties. Pet. App. 3a-4a. After CERCLA's enactment, Congress "estab-

lished a study group to examine the 'adequacy of existing common law and statutory remedies in providing legal redress for harm . . . caused by the release of hazardous substances into the environment.'" *Id.* at 4a (quoting 42 U.S.C. § 9651(e)(1)). The study group determined that environmental claims have long latency periods not suited for statutes of limitations running from the time of the defendant's last act or from the plaintiff's exposure to harm. Pet. App. 4a-5a. So, the study group recommended to the states that they "'adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause,'" and "'repeal . . . statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring [a] plaintiff's claim before he knows that he has one.'" Pet. App. 5a (quoting Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes-Analysis and Improvement of Legal Remedies pt. 1, at 241 (Comm. Print 1982)). In 1986, the majority explained, Congress intervened by passing § 9658 instead of waiting for the states to amend their state laws. *Id.*

The majority next "review[ed] the concepts of limitations and repose." Pet. App. 9a. It noted that both limit the amount of time that a plaintiff has to bring suit. A statute of limitations "'bars claims after a specified period . . . based on the date when the claim accrued (*as when the injury occurred or was discovered*),'" and is designed to discourage plaintiffs from sitting on their rights while evidence is lost. Pet. App. 10a (quoting Black's Law Dictionary 1546 (9th ed. 2009) (emphasis added)). A statute of repose, by contrast, "'bar[s] any suit that is brought after a specified time *since the defendant acted* . . . even if this

period ends before the plaintiff has suffered a resulting injury'" and before the claim accrues. *Id.* (quoting Black's Law Dictionary at 1546 (emphasis added)). A statute of repose's grant of substantive immunity is designed to balance the interests of plaintiffs and defendants by setting a time limit beyond which no liability exists. *Id.* The majority concluded that the 10-year period at issue in this case was a statute of repose under these general definitions, as the North Carolina courts themselves had repeatedly held. Pet. App. 10a-11a.

The majority then turned to § 9658's language. It conceded that the district court could reasonably interpret § 9658 not to reach statutes of repose because it mentioned the phrase "statute of limitations" five times and the phrase "statute of repose" zero times. Pet. App. 11a-12a. Yet the majority ultimately concluded that the provision was ambiguous as to whether Congress meant the phrase "statute of limitations" to encompass statutes of repose. Pet. App. 11a. The majority reasoned that the statute of repose at issue here appears in a section of the North Carolina Code entitled "Limitations, Other than Real Property," so it could be interpreted to fall within § 9658(a) because it was "'specified in the State statute of limitations or under common law.'" Pet. App. 12a. The majority next noted that the statute of repose could be interpreted to qualify under § 9658(b)'s definition of "applicable limitations period" because it was a "period," "specified in a statute of limitations," "during which a civil action . . . may be brought." *Id.* Finally, because the statute of repose began to run at the time of the defendant's last action, its "commencement period" was earlier than the federal

commencement date and could be interpreted to trigger that delayed date. Pet. App. 12a-13a.

To avoid the appearance that it was "stretching to find ambiguity in the text," the majority provided two additional rationales to support its interpretation that the phrase "statute of limitations" could include "statute of repose." Pet. App. 13a. It noted that "a historical analysis reveals that both scholars and courts have often used the terms interchangeably." *Id.* Given this confusion, the majority found it probable that Congress intended for statute of limitations to cover statutes of repose. *Id.* Additionally, the majority opined that there is a "lack of internal consistency" between § 9658's substantive provision (§ 9658(a)(1)) and its definitional provision (§ 9658(b)(2)). The substantive provision indicates that it applies to an "applicable limitations period" "as specified in the State statute of limitations or under common law." The definition of "applicable limitations period," by contrast, defines the phrase as "the period specified in a statute of limitations" without reference to the common law. Pet. App. 13a-14a. The majority thus noted that § 9658 failed to manifest a plain meaning when state common law (rather than state statutory law) establishes the relevant limitations period. *Id.*

The majority resolved this perceived ambiguity by holding that § 9658 preempts the commencement dates in state statutes of repose. It relied on three factors. First, it cited the study group's recommendations—which were "equally concerned with statutes of repose and limitations, and with their effect of barring plaintiffs' claims before they are aware of them." Pet. App. 14a. Second, it cited CERCLA's "remedial"

nature, opting for a "broad interpretation" of "statute of limitations" to further the statute's remedial goals. *Id.* at 15a. Third, it cited the Ninth Circuit's *McDonald* decision, noting that it was "unpersuaded" by the Fifth Circuit's contrary analysis regarding the plain meaning of § 9658's text. *Id.* at 16a.

The majority concluded by suggesting that its holding may "raise the ire" of "corporations and other entities" that rely on statutes of repose, but explained that it had not turned a "blind eye" to the policies that these statutes vindicate. *Id.* After all, the majority noted, a plaintiff still must meet its burden of proof on the merits, which will prove more difficult as time passes. *Id.* at 17a. And, while its holding effectively eliminated the statute of repose by starting it and the statute of limitations at the exact same time, the 3-year period still applied so "defendants will not necessarily be endlessly subjected to the possibility of litigation." *Id.* Finally, the majority expressed again that its holding comported with the study group's recommendations. *Id.*

Judge Davis, in a short concurrence, noted that § 9658's "plain language" need not establish an ambiguity if other tools of statutory interpretation proved that an ambiguity existed. Pet. App. 18a.

Judge Thacker dissented. Pet. App. 19a-37a. Beginning with § 9658's plain language, the dissent rejected the majority's argument that the phrase "statute of limitations" was ambiguous in 1986 when Congress adopted § 9658. The dissent recognized the "modern vintage" of the differences between "statutes of limitations" and "statutes of repose." Pet. App. 24a. But this did not help the majority. Historically, statutes of limitations were "considered, along with

other statutory time-bars, to provide repose to litigants and were thus, generally, statutes of repose." Pet. App. 24a. In 1986, therefore, "the only possible ambiguity may have been the meaning of 'statute of repose' and whether that term had fully matured into its modern definition." Pet. App. 26a. There had, by contrast, never been any ambiguity on the narrower scope of the phrase "statute of limitations"—the phrase actually used by § 9658.

In addition, the dissent noted that the majority's holding made § 9658 unworkable. "Importantly, the commencement date is defined as the *beginning* of the period in which a civil action may be brought." Pet. App. 29a (citing 42 U.S.C. § 9658(b)(2)-(3)). But statutes of repose like North Carolina's do not create a beginning point when a claim may be brought; they create an outer limit *whether or not* the claim could have been brought before that limit runs. *Id.* As such, "[b]ecause North Carolina's statute of repose does not create the beginning of the applicable limitations period, § 9658 cannot graft neatly—or at all—onto the North Carolina statute of repose so as to preempt its enforcement." *Id.*

While recognizing that the court need not look to legislative history because the plain language must control, the dissent also asserted that the relevant legislative history supported its "conclusion that Congress was aware that statutes of limitations were a distinct category of time-bar statutes and specifically chose only to preempt those statutes and not other statutory time bars such as statutes of repose." *Id.* at 29a. Specifically, the study group's report on which the majority had relied expressly distinguished between statutes of limitations and statutes of repose,

recommending changes to *both* types of statutes. *Id.* at 31a. That the very recommendations underlying § 9658 distinguished these two kinds of statutes illustrates that Congress could not have been confused about their separate meanings. *Id.* at 32a.

The dissent bolstered this interpretation with two canons of statutory interpretation. For one, the dissent explained that "the role of legislative compromise" should play a part in § 9658's interpretation. *Id.* at 32a. The study group recommended a host of procedural reforms to state tort claims, but Congress, through § 9658, adopted only the recommendation concerning statutes of limitations. *Id.* at 34a. By doing so, Congress struck "a balance between harmonizing certain procedural matters in toxic tort cases and allowing states to continue to regulate their own substantive areas of law." *Id.* at 34a-35a. The majority frustrated this compromise (and the legislative intent) by departing from the plain language and expanding the reach of the statute.

For another, this case "arises in the context of federal preemption," so the long-standing presumption against preemption should apply. *Id.* at 35a "Just as [courts] presume 'Congress does not cavalierly preempt state-law causes of action[,]' [the courts] should also presume that Congress does not cavalierly preempt state substantive rights to be free from those state-law causes of action." *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). This general presumption weighed against giving § 9658 an overly broad preemptive effect. Pet. App. 35a-36a.

Since issuing its decision, the Fourth Circuit has stayed its mandate pending this Court's disposition of this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The Court should grant CTS Corporation's petition for a writ of certiorari. *First*, the Fourth Circuit's decision deepens a split in the federal and state appellate courts over whether 42 U.S.C. § 9658 applies only to state statutes of limitations or also to state statutes of repose. *Second*, the Fourth Circuit's decision raises a legal issue of great practical and intrinsic importance. The question presented arises with great frequency, often in cases where millions of dollars are at stake. And the question presented is also of intrinsic importance because it affects the federal-state balance of power in an area of traditional state regulation. *Third*, the Fourth Circuit's decision runs contrary to the plain statutory text and so conflicts with this Court's settled principles of statutory interpretation. The decision below also defies this Court's long-standing presumption against preemption by construing a supposedly ambiguous federal statute to invade a traditional area of state regulation. *Fourth*, and finally, this case provides an ideal vehicle for reviewing this pure question of law, as it was decided on a motion to dismiss, and there is no dispute that the Respondents' state claim would be eliminated under North Carolina's statute of repose unless § 9658 preempts that state statute.

I. THE FOURTH CIRCUIT'S DECISION DEEPENS A CONFLICT IN THE STATE AND FEDERAL APPELLATE COURTS

The Court should grant CTS Corporation's petition for a writ of certiorari initially because several federal and state appellate decisions have reached different conclusions on the question whether 42 U.S.C. § 9658 preempts state statutes of repose.

A. On the one hand, the Fifth Circuit has held that "the plain language of § 9658 does not extend to statutes of repose." *Burlington N. & Santa Fe Ry. v. Poole Chem. Co.*, 419 F.3d 355, 362 (5th Cir. 2005). In that case, the plaintiff sued the defendant for cleanup costs resulting from the 2003 rupture of a chemical storage tank that had been previously installed in 1988. *See id.* at 358. Because the plaintiff's state claims were barred by Texas's 15-year statute of repose, the plaintiff argued that § 9658 preempted that statute. *See id.* at 361. The Fifth Circuit rejected this argument, and affirmed the dismissal of the suit. *Id.* at 362-65.

The court began with § 9658's plain language, noting that the text covered only statutes of limitations and nowhere mentioned statutes of repose. *Id.* at 362. The "differences between statutes of limitations and statutes of repose," the court reasoned, "are substantive, not merely semantic." *Id.* A statute of limitations "extinguishes the right to prosecute an accrued cause of action after a period of time," whereas a statute of repose "abolishes the cause of action after the passage of time even though the cause of action may not have yet accrued." *Id.* at 363. Thus, statutes of limitations generally run from the date of the plaintiff's injury and, as they are triggered by an injury, generally toll this period until the plaintiff reasonably should have learned of that injury. *Id.* "In contrast, awareness of injury is not a factor in determining when the time period of a statute of repose starts to run," as it is triggered by the defendant's underlying conduct, whether or not the plaintiff's claim has accrued. *Id.*

The Fifth Circuit next concluded that § 9658's plain language must control because no other factors illustrated an "express congressional intent to the contrary." *Id.* at 364. According to the court, "CERCLA's legislative history indicates Congress intended for § 9658 to preempt a state statute of limitations that deprives a plaintiff who suffers a long-latency disease caused by the release of a hazardous substance of his cause of action, but not to preempt a state statute of repose" that is not at all tied to the plaintiff's injury. *Id.* & nn.44-45 (citing H.R. Conf.. Rep. No. 99-962, 2d Sess. 262, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354). In light of this legislative history, reading § 9658's reference to "statutes of limitations" according to its terms "comports with a fundamental principle of statutory construction—common sense." *Burlington*, 419 F.3d at 364.

The Supreme Court of South Dakota later adopted the Fifth Circuit's interpretation of § 9658. *See Clark Cnty. v. Sioux Equip. Corp.*, 753 N.W.2d 406, 417 (S.D. 2008). In *Clark*, the defendant installed a fuel-storage system on the plaintiff's property. The defendant completed the work in 1992, and the plaintiff brought suit in 2006 to recover the cleanup costs of a fuel leak several years earlier. *See id.* at 408-09. In response to the defendant's argument that the state statute of repose had run, the plaintiff asserted that CERCLA preempted it. Relying on *Burlington*, *see id.* at 414-17, the South Dakota Supreme Court held that "the plain text controls." *Id.* at 417. "[T]he plain language of CERCLA only preempts state law when the applicable 'state statute of limitations' provides a commencement date that is earlier than the federally required commencement date," the court noted, and "Congress failed to include substantively different

statutes of repose within this preemptive rule." *Id.* at 417.

B. The Ninth Circuit subsequently departed from the Fifth Circuit over whether § 9658 applies to state statutes of repose. *See McDonald v. Sun Oil Co.*, 548 F.3d 774, 779 (9th Cir. 2008). In *McDonald*, the defendant sold property to the plaintiffs in 1976, and the plaintiffs learned in 2001 that the property might be contaminated with mercury. *Id.* at 778. The district court granted the defendant's motion for summary judgment on plaintiffs' negligence claim, relying on the Fifth Circuit's *Burlington* decision to hold that § 9658 does not apply to Oregon's statute of repose. *See McDonald v. Sun Oil Co.*, 423 F. Supp. 2d 1114, 1127 (D. Or. 2006). The Ninth Circuit reversed, holding that "the term 'statute of limitations' in [§ 9658] is ambiguous and the legislative history of the section indicates that its meaning includes statutes of repose[.]" 548 F.3d at 797.

The Ninth Circuit found § 9658 ambiguous as to whether the phrase "statute of limitations" includes "statutes of repose" because "a number of cases confused the terms or used them interchangeably" when Congress adopted the provision in 1986. *Id.* at 781. As such, the Ninth Circuit criticized the Fifth Circuit's plain-meaning approach because it "failed to analyze the meaning of 'statute of limitations' at the time [§ 9658] was adopted." *Id.* at 782. The court then turned to the legislative history, which "show[ed] that Congress's primary concern in enacting [§ 9658] was to adopt the discovery rule in situations where a plaintiff may lose a cause of action before becoming aware of it[.]" *Id.* at 783. Because this predicament was "most likely to occur where statutes

of repose operate," the court held that such statutes should be included within § 9658 to further the section's underlying purpose. *Id.*

The Fourth Circuit's fractured decision in this case has deepened this split of appellate authority—with the majority joining the Ninth Circuit's side of the debate and the dissent joining the side of the Fifth Circuit and the Supreme Court of South Dakota. As explained above, *supra* at 11, in addition to the Ninth Circuit's textual analysis and reliance on legislative history, the Fourth Circuit also chose a liberal construction of § 9658 because "Congress's purpose in enacting CERCLA was remedial." Pet. App. 14a.

* * * *

The Court need not take CTS Corporation's word for this substantial conflict in the appellate courts. District judges have repeatedly recognized it as well. As the District of Kansas recently noted, "[t]he circuits . . . are split on the issue of whether § 9658 preempts state statutes of repose." *Mechler v. United States*, No. 12-1183, 2013 BL 205882, at *8 (D. Kan. Aug. 2, 2013). Likewise, the Southern District of Alabama has noted that "the Fifth Circuit in *Burlington* and the Ninth Circuit in *McDonald*" "disagreed on the application of § 9658 to statutes of repose." *Abrams v. Ciba Specialty Chems. Corp.*, 659 F. Supp. 2d 1225, 1238 (S.D. Ala. 2009). Only this Court can now resolve this clear split of authority in the lower courts.

II. THE FOURTH CIRCUIT'S DECISION RAISES AN IMPORTANT AND RECURRING LEGAL ISSUE

The Court should also grant CTS Corporation's petition because it raises an important and recurring

legal issue. To begin with, the stakes are often high in environmental tort cases, with millions of dollars routinely at issue. *See, e.g.*, *Burlington*, 419 F.3d at 358 (noting that the alleged cleanup cost was $2.1 million); *see also United States v. Charter Int'l Oil Co.*, 83 F.3d 510, 512 (1st Cir. 1996) ("Multiples of millions of dollars are involved in [CERCLA] settlements and the stakes are high, both for the public and for the parties involved"); Andrew P. Morriss & Roger E. Meiners, *The Destructive Role of Land Use Planning*, 14 Tulane Envtl. L. J. 95, 124-25 & n.108 (2000) (citing cases for the proposition that "each year some of the largest tort judgments in the nation are against invaders of private property" in environmental suits). And because governments can be CERCLA defendants, the question presented also impacts the public fisc. *See Anderson v. United States*, 669 F.3d 161, 165 (4th Cir. 2011); *Simmons v. United States*, 421 F.3d 1199, 1202 (11th Cir. 2005) (per curiam); *see also* Br. of United States as *Amicus Curiae* in Support of Appellee at 2, *Waldburger v. CTS Corp.*, 2013 WL 3455775 (4th Cir. July 10, 2013) (No. 12-1290). Thus, many millions of dollars turn on the pure question of law presented here.

The question presented also implicates the balance of power between the federal government and the states. The "federalist structure of joint sovereigns preserves to the people numerous advantages." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *see Bond v. United States*, 131 S. Ct. 2355, 2364-65 (2011). But, given the Supremacy Clause, "Congress may legislate in areas traditionally regulated by the States," which is "an extraordinary power in a federalist system," one that this Court "must assume Congress does not exercise lightly." *Gregory*, 501 U.S. at

460. As such, the Court has repeatedly granted certiorari to determine whether federal laws were unambiguously meant to intrude on state prerogatives. *See, e.g.*, *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 544-45 (2002) (deciding whether 28 U.S.C. § 1367(d) should be interpreted to toll state statute of limitations against state actors); *Gregory*, 501 U.S. at 464-70 (deciding whether ADEA covers state judges); *cf. Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992) (exercising discretion to accept original jurisdiction because case "'implicates serious and important concerns of federalism'" (citation omitted)).

This case raises similar federalism concerns. Section 9658 undoubtedly invades the states' traditional authority to establish the limits that govern their *own* tort actions. *Cf. Raygor*, 534 U.S. at 544 ("allowing federal law to extend the time period in which a state sovereign is amenable to suit in its own courts at least affects the federal balance in an area that has been a historic power of the States"). The Fifth Circuit's interpretation of § 9658 amounts to a minor encroachment by only delaying the beginning of the state statutes of limitations. The Fourth Circuit's "liberal construction" of § 9658, by contrast, dramatically increases the scope of this intrusion by effectively eviscerating state statutes of repose. *See* N.C. Gen. Stat. § 1-52. If § 9658 applies to start both the statute of limitations and the statute of repose *at the same time* (as the Fourth Circuit held), then the statute of limitations always will have run well before the statute of repose, thereby making the latter a nullity. Whether right or wrong, the decision's impact on traditional state prerogatives cannot be doubted and justifies the Court's review.

Finally, the question presented arises frequently. The district courts, for example, consider this issue often and are even more divided than the appellate courts. In addition to the district court and magistrate below, *see* Pet. App. 38a, 47a, several courts have adopted the Fifth Circuit's view that § 9658 simply does not reach statutes of repose. *See Clark*, 753 N.W.2d at 415 (noting at the time that "[a]ll recent federal district courts agree[d]" with the Fifth Circuit); *see, e.g.*, *Coleman v. H.C. Price Co.*, No. 11-2937, 2013 WL 64613, at *2-3 & n.3 (E.D. La. Jan. 4, 2013) (finding that § 9658 does not preempt statute of repose); *McDonald*, 423 F. Supp. at 1127 (same). Others have taken the Ninth Circuit's approach. *See Mechler*, 2013 BL 205882, at *8-9; *A.S.I., Inc. v. Sanders*, 835 F. Supp. 1349, 1358 (D. Kan. 1993).

Indeed, district courts in Alabama have repeatedly disagreed over whether § 9658 applies to the *very same* statute of repose. *Compare Evans v. Walter Indus., Inc.*, 579 F. Supp. 2d 1349, 1358-64 (N.D. Ala. 2008) (holding that § 9658 does not preempt Alabama's statute of repose); *German ex rel. Grace v. CSX Transp., Inc.*, 510 F. Supp. 2d 630, 633-34 (S.D. Ala. 2007) (same); *with Moore v. Walter Coke, Inc.*, No. 2:11-cv-1391-SLB, 2012 WL 4731255, at *9-13 (N.D. Ala. Sept. 28, 2012) (holding that § 9658 preempts Alabama's statute of repose); *Abrams*, 659 F. Supp. 2d at 1231-39 (same); *Fisher v. Ciba Specialty Chem. Corp.*, No. 03-0566, 2007 WL 2995525, at *15 (S.D. Ala. Oct. 11, 2007) (same). Despite the frequency with which this legal issue arises, the typically massive financial stakes involved often force settlement, thereby preventing many cases from reaching the courts of appeals.

In sum, both the importance of the question presented and the frequency with which it arises confirm that certiorari should be granted in this case.

III. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CASE LAW

The Court should also grant certiorari because the Fourth Circuit's decision conflicts with numerous principles that this Court has directed lower courts to follow when interpreting federal statutes.

First, the Fourth Circuit's holding that the phrase "statute of limitations" is ambiguous conflicts with the "cardinal rule of statutory construction" that plain statutory terms should carry their plain meanings. *Molzof v. United States*, 502 U.S. 301, 307 (1992); *see, e.g.*, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 58 (2007) (interpreting the term "willful"); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (interpreting the term "seaman"). This bedrock principle has special force when the statutory term at issue is a legal term of art with a well-settled definition. *See, e.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976). "In the absence of contrary indication, [the Court] assume[s] that when a statute uses . . . a term [of art], Congress intended it to have its established meaning." *McDermott Int'l*, 498 U.S. at 342.

Yet the Fourth Circuit identified no legal authority indicating that the phrase "statute of limitations" had a legal meaning encompassing a statute of repose when Congress enacted § 9658 in 1986. Rather, the phrases "statute of limitations" and "statute of repose" were distinct terms of art that distinguished distinct types of provisions. Indeed, the case law repeatedly used the phrase "statute of repose" to dis-

tinguish statutes of limitations from statutes "that begin 'to run at a time unrelated to the traditional accrual of the cause of action.'" *Bolick v. Am. Barmag Corp.*, 293 S.E.2d 415, 418 (N.C. 1982); *see J.H. Westerman Co. v. Fireman's Fund Ins. Co.*, 499 A.2d 116, 119 (D.C. 1985) ("A statute of repose differs from an ordinary statute of limitations in that the specified time period begins to run not from the date on which a right of action accrues, but from another ascertainable date."); *James Ferrera & Sons, Inc. v. Samuels*, 486 N.E.2d 58, 60 (Mass. App. Ct. 1985) ("There is a marked difference between a statute of limitations and a statute of repose."); *Univ. Eng'g Corp. v. Perez*, 451 So.2d 463, 465 (Fla. 1984) (per curiam) ("A statute of repose should be distinguished from a statute of limitations."); *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1985) ("As a statute of repose is not a statute of limitations within the meaning of Superior Court Civil Rule 8(c), it need not be pleaded affirmatively."). The consensus view established by these cases was reflected in a well-known treatise: "Unlike an ordinary *statute of limitations* which begins running upon accrual of the claim, the period specified in a *statute of repose* begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted." 54 C.J.S. *Limitations of Actions* § 4, at 20-21 (1987) (emphases added). Even the study group whose recommendations formed the basis for § 9658 recognized the distinctions between the two types of statutes. Pet. App. 31a. Notably, however, § 9658 repeatedly identifies *only* statutes of limitations, *not* statutes of repose, as falling within its reach. The statute should have

been interpreted accordingly. *See McDermott*, 498 U.S. at 342.

To reach its contrary conclusion that the phrases statute of limitations and statute of repose are fungible, the Fourth Circuit suggested that "a historical analysis reveals that both scholars and courts have often used the terms interchangeably." Pet. App. 13a. That is not so. As the dissent noted, Pet. App. 24a, courts had historically viewed "statute of repose" as the catch-all phrase covering different types of time bars, including statutes of limitations. *See Bolick*, 293 S.E.2d at 417 (noting that "the term 'statute of repose' has traditionally been used to encompass statutes of limitation"); *see, e.g., United States v. Kubrick*, 444 U.S. 111, 117 (1979) (referring to a statute of limitations as a statute of repose). But simply because the phrase statute of repose could be interpreted to cover statutes of limitations does not justify the Fourth Circuit's converse holding that the phrase statute of limitations could be interpreted to cover statutes of repose.

In all events, in the decade immediately preceding § 9658's enactment, courts had repeatedly used the phrase "statute of repose" in its *narrower* sense to define the flurry of state laws that tied the running of the applicable time limit to the defendant's actions rather than the claim's accrual. *See Lamb v. Wedgewood South Corp.*, 302 S.E.2d 868, 872 (N.C. 1983) ("This statute, like many others enacted throughout the nation, is a 'statute of repose,' which this Court has recognized constitutes a substantive definition of, rather than a procedural limitation on, rights."); *see also* Restatement (Second) of Torts § 899 cmt. g (1979) ("In recent years special 'statutes of re-

pose' have been adopted in some states covering particular kinds of activity. . . ."). Thus, far from considering this background context in which Congress enacted § 9658, the Fourth Circuit ignored it.

Second, after improperly finding an ambiguity in the phrase "statute of limitations," the Fourth Circuit improperly resolved that ambiguity by relying on CERCLA's general purposes. As this Court has repeatedly indicated, however, "'no law pursues its purpose at all costs, and . . . the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Kucana v. Holder*, 558 U.S. 233, 252 (2010) (citing *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality opinion)). In other words, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam); *cf. In re Erickson*, 815 F.2d 1090, 1094 (7th Cir. 1987) (Easterbrook, J.) ("Finding the meaning of a statute is more like calculating a vector (with direction and length) than it is like identifying which way the underlying 'values' or 'purposes' point (which has direction alone).").

As the dissent explained, Pet. App. 35a, the Fourth Circuit made exactly this mistake. The majority adopted the interpretation that allegedly furthered CERCLA's "remedial" purpose, noting that the Fifth Circuit's reading of statute of limitations "offers too narrow an approach and one that thwarts Congress's unmistakable goal of removing barriers to relief from

toxic wreckage." Pet. App. 15a. But it is unmistakably clear that Congress did *not* seek to remove all of the state procedural barriers that the study group suggested should be removed, because it did not adopt most of them. *See* Pet. App. 32a. For example, the study group recommended modified evidentiary presumptions and liberal joinder rules—yet those proposals were not adopted. *See ibid.* So the Fourth Circuit was wrong to suggest that "*whatever* furthers [§ 9658's] primary objective must be the law." *Rodriguez*, 480 U.S. at 526. Indeed, as the Fifth Circuit explained, *see Burlington*, 419 F.3d at 364 nn.44-45, the legislative history suggests that Congress was concerned *only* with some state statutes of limitations that begin to run on the plaintiff's injury rather than the plaintiff's discovery of the injury: "In the case of a long-latency disease, such as cancer, a party may be barred from bringing his lawsuit if the statute of limitations begins to run at the time of the first injury—rather than from the time when the party 'discovers' that his injury was caused by the hazardous substance or pollutant or contaminant concerned." H.R. Conf. Rep. No. 99-962, 2d Sess. 262, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354.

Third, even if the phrase "statute of limitations" were ambiguous, the Fourth Circuit erred by ignoring the "presumption against preemption" when resolving that ambiguity. *See, e.g., Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). That presumption against preemption "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Under the presumption, "when the text

of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

Here, as the dissent observed, the "ability of a state to create a substantive right to be free from liability under its own state tort law is unquestionably a traditional field of state regulation." Pet. App. 35a; *see, e.g.*, *Raygor*, 534 U.S. at 544; *Hillsborough Cnty.*, 471 U.S. at 715. Section 9658 thus triggers the presumption against preemption, and the Fourth Circuit should have construed any ambiguity to *avoid* preemption. *See Altria*, 555 U.S. at 77. But the majority did exactly the opposite. It relied on CERCLA's remedial purpose to interpret all ambiguities in *favor* of preemption. When doing so, moreover, the Fourth Circuit did not even mention the presumption against preemption or offer an explanation why that presumption somehow does not apply here. Pet. App. 7a-16a. By flipping the presumption on its head, the Fourth Circuit again departed from this Court's precedents on interpreting federal statutes.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED

Finally, this case presents an ideal vehicle for resolving the question presented. As an initial matter, there is no dispute that the question presented is outcome dispositive on the facts alleged in the complaint. While disagreeing on whether § 9658 reaches state statutes of repose, the lower courts have universally agreed that N.C. Gen. Stat. § 1-52(16) would bar Respondents' nuisance claim if § 9658 did not otherwise preempt that statute. Pet. App. 9a, 19a,

38a, 44a. That statute of repose runs from "the last act or omission of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-52(16). And the complaint makes clear that CTS Corporation's last conceivable act occurred in 1987—when it sold the relevant property—well over two decades before Respondents filed this suit in 2011. Pet. App. 53a-55a. Accordingly, Respondents suit may proceed *only if* the Fourth Circuit correctly interpreted § 9658 to preempt N.C. Gen. Stat. § 1-52(16).

There is also no dispute that N.C. Gen. Stat. § 1-52(16) is a statute of repose rather than a statute of limitations. Every judge to have considered this question in this case has reached that conclusion. Pet. App. 10a, 19a, 38a, 44a. The North Carolina courts also agree. *See, e.g.*, *Wilson v. McLeod Oil Co.*, 398 S.E.2d 586, 597 (N.C. 1990) (finding claims to be barred "by the *statute of repose* found in § 1-52(16)" (emphasis added)); *Neblett v. Hanover Inspection Serv., Inc.*, No. COA06-1676, 2007 WL 2701349, at *4 (N.C. Ct. App. Sept. 18, 2007) (same). So the Court need not worry about preliminary questions over whether the state statute under review falls on the "statute of repose" or "statute of limitations" side of the line. Rather, the Court can concern itself solely with the question whether § 9658 covers both kinds of statutes or reaches only statutes of limitation.

Additionally, the procedural posture of this case—a final judgment after the grant of a motion to dismiss—allows the Court to resolve the question in an efficient manner without having to confront any disputed issues of fact or side legal issues. Respondents' complaint runs only nine pages. And their appeal in

the Fourth Circuit addressed only the legal question presented in this case.

For these reasons, the Court could not ask for a better vehicle to resolve the important legal question presented on which the federal and state appellate courts have split. The question is outcome determinative on the facts alleged, it arises at a stage with a small record, and it is the sole issue presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 13, 2013

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APPENDIX

APPENDIX A

United States Court of Appeals,
Fourth Circuit.
No. 12–1290.

Peter WALDBURGER; Sandra Ratcliffe; Lee Ann Smith; Tom Pinner, IV, a/k/a Bud Pinner, IV; Hans Momkes; Wilma Momkes; Walter Dockins, Jr.; Autumn Dockins; William Clark Lisenbee; Dan Murphy; Lori Murphy; Robert Aversano; Daniel L. Murphy; Laura A. Carson; Glen Horecky; Gina Horecky; Renee Richardson; David Bradley; Byron Hovey; Ramona Hovey; Peter Tatum MacQueen, IV; Bethan MacQueen; Patricia Pinner; Tom Pinner, III, a/k/a Buddy Pinner, III; Madeline Pinner, Plaintiffs–Appellants,

v.

CTS CORPORATION, Defendant–Appellee.

United States of America, Amicus Supporting Appellee.

Argued Jan. 30, 2013.

Decided July 10, 2013.

Before DAVIS, FLOYD, and THACKER, Circuit Judges.

Reversed and remanded by published opinion. Judge Floyd wrote the majority opinion, in which Judge Davis joined. Judge Davis wrote a separate concurring opinion. Judge Thacker wrote a dissenting opinion.

FLOYD, Circuit Judge:

In 2009, Appellants David Bradley and Renee Richardson received unwelcome news: Their well water contained concentrated levels of trichloroethylene (TCE) and cis–1, 2–dichloroethane (DCE), both solvents that have carcinogenic effects. Not surprisingly, Bradley and Richardson, and twenty-three other landowners (collectively, "the landowners"), brought a nuisance action against Appellee CTS Corporation (CTS), the alleged perpetrator. Concluding that North Carolina's ten-year limitation on the accrual of real property claims barred the suit, the district court granted CTS's Rule 12(b)(6) motion to dismiss. Having reviewed the dismissal de novo, assuming that the facts stated in the complaint are true, *Lambeth v. Bd. of Commis*, 407 F.3d 266, 268 (4th Cir. 2005), we hold that the discovery rule articulated in § 9658 of the Comprehensive Environmental Response, Liability, and Compensation Act (CERCLA), 42 U.S.C. §§ 9601–9675, preempts North Carolina's ten-year limitation. Thus, we reverse and remand.

I.

In the 1960s and '70s, the United States witnessed the repercussions of toxic waste dumping like it never had before. The Valley of the Drums[1] and Love

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[1] The Valley of the Drums is a twenty-three acre site near Louisville, Kentucky, where a large number of waste-storing drums were deposited in the 1960s. The drums' leakage and the lack of regulation at the site caused an environmental disaster. *NPL Site Narrative for A.L. Taylor (Valley of the Drums)*, Envtl. Prot. Agency (Sept. 8, 1983), http:// www.epa.gov/superfund/sites/npl/nar447.htm.

Canal[2] disasters made headlines, urging Congress to pass legislation that granted some measure of redress. In response, in 1980, Congress passed CERCLA, an act aimed at promoting efficient and equitable responses to the fallout from hazardous waste. *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). Because Congress passed the legislation during the closing hours of its ninety-sixth session, and only after it reached a compromise reflecting the "blending of three separate bills," CERCLA is often criticized for its lack of precision. *See, e.g., State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1039–40 (2d Cir. 1985) ("In 1980, while the Senate considered one early version of CERCLA, the House considered and passed another. The version passed by both Houses, however, was an eleventh hour compromise put together primarily by Senate leaders and sponsors of the earlier Senate versions." (citations omitted)); *Artesian Water Co. v. New Castle Cnty.*, 851 F.2d 643, 648 (3d Cir. 1988) ("CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage."); *see also Rhodes v. Cnty. of Darlington*, 833 F. Supp. 1163, 1172–76 (D.S.C.1992) (providing a thorough recounting of CERCLA's history). Regardless, it remains undisputed that CERCLA is a remedial

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[2] Love Canal is an area near Niagara Falls, New York. In the 1920s, it became a dumpsite for toxic chemicals. The extent of the site's contamination was brought to light in the mid-1970s. Eckardt C. Beck, *The Love Canal Tragedy*, Envtl. Prot. Agency (Jan. 1979), http://www.epa.gov/history/topics/lovecanal/01.html.

statute designed to (1) "establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites" and (2) "shift the costs of cleanup to the parties responsible for the contamination." *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 826–27 (7th Cir. 2007) (quoting H.R. Rep. No. 96–1016, pt. 1, at 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120) (internal quotation marks omitted); *see also Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 120 (2d Cir. 2010) ("Enacted in response to New York's Love Canal disaster, CERCLA was designed, in part, to '[ensure] that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions.'" (footnote omitted) (quoting S. Rep. No. 96–848, at 13 (1980)).

Evidently wary about the effectiveness of the Act's final version, Congress immediately established a study group to examine the "adequacy of existing common law and statutory remedies in providing legal redress for harm . . . caused by the release of hazardous substances into the environment." 42 U.S.C. § 9651(e)(1). The Group consisted of twelve members designated by the American Bar Association, the American Trial Lawyers Association, the Association of State Attorneys General, and the American Law Institute. *Id.* § 9651(e)(2). Among other "[r]ecurring [i]ssues in [h]azardous [w]aste [l]itigation," it considered the effect that state limitations periods have on causes of action related to hazardous waste, noting that (1) injuries from such waste generally have "long latency periods, sometimes 20 years or longer" and (2) if a state

decrees that a cause of action will accrue upon a defendant's last act or a plaintiff's exposure to harm, the statute of limitations often will fully run and defeat a lawsuit before a plaintiff is aware of his injury. Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes–Analysis and Improvement of Legal Remedies pt. 1, at 28 (Comm. Print 1982). Purposing to "remove unreasonable procedural and other barriers to recovery in court . . ., including rules relating to the time of accrual of actions," *id.* at 240, the Group issued the following recommendation: "that all states . . . clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause," *id.* at 241. Worth noting is that the Group did not confine its concerns simply to statutes of limitation: "The Recommendation is intended also to cover the repeal of statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring [a] plaintiff's claim before he knows that he has one." *Id.*

Instead of waiting for individual states to amend their respective statutes, in 1986 Congress chose to "address[ ] the problem identified in the . . . study," H.R. Conf. Rep. No. 99–962, at 261, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354, by enacting § 9658 of CERCLA:

> (a) State statutes of limitations for hazardous substance cases
>
> (1) Exception to State statutes
>
> In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure

> to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.
>
> (2) State law generally applicable
>
> Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

42 U.S.C. § 9658. Per the section's definition section, "'applicable limitations period' means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) . . . may be brought," *id.* § 9658(b)(2), "'commencement date' means the date specified in a statute of limitations as the beginning of the applicable limitations period," *id.* § 9658(b)(3), and "'federally required commencement date' means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." *Id.* § 9658(b)(4)(A). Thus, if a state statute of limitations provides that the period in

which an action may be brought begins to run prior to a plaintiff's knowledge of his injury, § 9658 preempts the state law and allows the period to run from the time of the plaintiff's actual or constructive knowledge. And if a minor or incompetent plaintiff is involved, the period does not begin to run until the plaintiff reaches majority or competency or "has a legal representative appointed." *Id.* § 9658(b)(4)(B).

II.

During the twenty-seven years since Congress passed § 9658, the amendment has no doubt served the goal of preserving claims that otherwise would have been defeated by state statutes of limitations. But it has also generated controversy. We address one such area of dispute here—namely, whether § 9658 preempts state statutes of repose.

A.

The site at issue in this case is in Asheville, North Carolina, where CTS formerly operated a fifty-four-acre plant.[3] CTS "manufactures" and "disposes of" electronics and electronic parts, and from 1959 to 1985, it operated the Mills Gap Road Electroplating Facility (the Facility) in Asheville. At the Facility, CTS stored notable quantities of TCE and manufactured products using TCE, cyanide, chromium VI, and lead.

In 1987, CTS sold the Facility to Mills Gap Road Associates. CTS had promised realtors that the property "ha[d] been rendered in an environmentally

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[3] CTS was formed in 1959 as CTS of Asheville, Inc. In 1983, CTS of Asheville, Inc., dissolved, but CTS continued to operate the Asheville plant as CTS Corporation, Asheville Division until 1985.

clean condition," that "[t]o the best of [its] knowledge, no on-site disposal or otherwise wanton disposal methods were practiced at [the] facility," and that as soon as "the existing inventory of materials contained in drums and other miscellaneous equipment within the plant [was] removed from the premises, no threat to human health or the environment [would] remain."

Mills Gap Road Associates eventually sold portions of the land to Bradley, Richardson, and others, and as noted above, Bradley and Richardson learned subsequent to their purchases that their land was contaminated. Thus, they joined with others who "live in the vicinity of [their] residence" to bring a nuisance claim. The other property owners claim that they "have been and continue to be exposed to the CTS . . . toxins via contact from air, land and water."

The landowners cite damages such as "diminution in the value of their real property" and fear "for their health and safety and that of their family members." They request (1) a "judgment against [CTS] requiring reclamation of the 1,000,000 pounds of the toxic chemical contaminants" that belong to the corporation, (2) "remediation of the environmental harm caused by [CTS's] toxic chemicals," and (3) "monetary damages in an amount that will fully compensate them for all the losses and damages they have suffered, or . . . will suffer in the future."

B.

In North Carolina, real property actions are subject to a three-year statute of limitations per the "Limitations, Other than Real Property" section of the General Statutes. *See* N.C. Gen. Stat. § 1–52; *Crawford v. Boyette*, 464 S.E.2d 301, 303 (N.C. App.

1995). A real property action accrues when "physical damage to [a claimant's] property becomes apparent or ought reasonably to have become apparent." N.C. Gen. Stat. § 1–52(16). Notably, however, a claimant's actual or constructive knowledge of damage is not the only factor that regulates accrual. Nor does lack of such knowledge lend life to a claim indefinitely. Rather, § 1–52(16) prohibits a "cause of action [from] . . . accru[ing] more than 10 years from the last act or omission of the defendant giving rise to the cause of action." *Id.* Accordingly, once ten years have passed since a defendant's last tortious act, claims for damages from such conduct become nonexistent, regardless of whether a claimant had knowledge of his harm within the ten-year window.

Here, the last act or omission of CTS occurred in 1987, when it sold the Facility to Mills Gap Road Associates. Thus, when the landowners filed their nuisance action in 2011, CTS moved to dismiss, maintaining that North Carolina's ten-year limitation on the accrual of real property actions barred the claim. The landowners countered, citing § 9658 of CERCLA as preemptive of North Carolina's limitation. The magistrate judge rejected the landowners' argument. The court reasoned that the ten-year limitation is a statute of repose and that because § 9658 mentions only statutes of limitations, it is inapplicable here. Thus, it recommended dismissal, and the district court adopted the recommendation.

III.

Before analyzing the decision below, we briefly review the concepts of limitations and repose. Statutes of limitations and statutes of repose both

operate as limits on the amount of time that a plaintiff has to bring a claim. A statute of limitations is a "law that bars claims after a specified period . . . based on the date when the claim accrued (as when the injury occurred or was discovered)." *Black's Law Dictionary* 1546 (9th ed. 2009). As this Court has previously noted, such limitations serve defendants by "encourag[ing] prompt resolution of disputes by providing a simple procedural mechanism to dispose of stale claims." *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989). In contrast, a statute of repose "bar[s] any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* 1546 (9th ed. 2009). Where repose is concerned, "considerations of the economic best interests of the public as a whole" are at play, and "substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants [are] struck by determining a time limit beyond which liability no longer exists." *First United Methodist*, 882 F.2d at 866.

Here, North Carolina's ten-year limitation bars lawsuits "brought after a specified time since the defendant acted," *Black's Law Dictionary* 1546 (9th ed. 2009), without regard for the plaintiff's knowledge of his harm, N.C. Gen. Stat. § 1–52(16). As such, although North Carolina does not explicitly identify the limitation as a statute of repose (or, for that matter, use the word "repose" anywhere in its statutes), we think the court below properly categorized it as such. *Cf. Robinson v. Wadford*, 731 S.E.2d 539, 541 (N.C. Ct. App. 2012) (referring to the

ten-year limitation in § 1–52(16) as a statute of repose); *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 446 S.E.2d 603, 604 (N.C.Ct.App.1994) (same).

A.

Determining whether § 9658 affects the operation of North Carolina's ten-year limitation is an exercise in statutory interpretation. When we interpret statutes, our goal is to effectuate Congress's intent, *United States v. Abdelshafi*, 592 F.3d 602, 607 (4th Cir. 2010), and we accomplish this by first examining the text of the statute, *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 603 (4th Cir. 1999). If we find the meaning of the text plain, we accord it that meaning "[a]bsent . . . clearly expressed legislative intent to the contrary." *Abdelshafi*, 592 F.3d at 607 (quoting *United States v. Bell*, 5 F.3d 64, 68 (4th Cir. 1993)) (internal quotation marks omitted). If we determine that its meaning is ambiguous, however, we "look beyond the language of the statute to the legislative history for guidance." *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1482 (4th Cir. 1996) (en banc). Moreover, we determine whether a statute's language is plain "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Holland*, 181 F.3d at 603 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, (1997)) (internal quotation marks omitted).

B.

Here, we interpret a statute that is ambiguous. As noted by the district court, § 9658 uses the words "statute of limitations." Indeed, the phrase and its plural form appear five times. *See* § 9658(a), (b)(2),

(b)(3). Noticeably absent is the phrase "statutes of repose." Thus, a simple review of § 9658's language could reasonably lead to a conclusion that its application is limited only to statutes of limitations. We agree with the court below that the text is susceptible to this interpretation. But we also think that the text lends itself to an alternate reading—one that includes repose limitations such as North Carolina's.

Per the text of § 9658, a state limitations period must meet two conditions before the federally required commencement date applies to a cause of action: (1) it must be an "applicable limitations period" that is "specified in the State statute of limitations or under common law" and (2) it must "provide[ ] a commencement date which is earlier than the federally required commencement date." *Id.* § 9658(a)(1). For the following reasons, we think North Carolina's ten-year limitation meets these conditions here.

First, the ten-year bar is located with the statutes of limitations periods in a section titled, "Limitations, Other than Real Property." N.C. Gen. Stat. § 1–52. As such, it is a limitations period "specified in the State statute of limitations or under common law." *See* 42 U.S.C. § 9658(a)(1). Second, it is (1) a "period," (2) "specified in a statute of limitations," (3) "during which a civil action . . . may be brought"; thus, it comports with the definition of "applicable limitations period." *See id.* § 9658(b)(2). Finally, because the period begins to run when the defendant commits his last act, rather than when the plaintiff has knowledge of harm, its "commencement date . . . is earlier than the federally required commencement

date." *See id.* § 9658(a)(1). Accordingly, we conclude that in spite of § 9658's repeated use of the phrase "statute of limitations," the text is susceptible to an interpretation that includes repose limitations such as North Carolina's. In sum, we reckon § 9658's text capable of at least two interpretations, preventing it from being straightforwardly categorized as "plain and unambiguous."

Lest we seem to be stretching to find ambiguity in the text, we make two additional observations. First, the terms "statute of limitations" and "statute of repose" have seen considerable development in their usage and meaning. Indeed, a historical analysis reveals that both scholars and courts have often used the terms interchangeably. *See McDonald v. Sun*, 548 F.3d 774, 781 & n. 3, n. 4 (9th Cir. 2008) (collecting cases and academic articles that demonstrate a historical lack of distinction between the terms). Thus, in this context, Congress's choice to use "statute of limitations" is in no way dispositive as to whether it intended § 9658 to apply to statutes of repose. Rather, given the inconsistent manner in which the term has been used, it is entirely probable that in 1986, when Congress added § 9658 to CERCLA, it intended "statute of limitations" to include precisely the type of ten-year limitation that we are dealing with here. Second, § 9658 manifests a lack of internal consistency in its reference to an "applicable limitations period." Subsection (a)(1) notes that such a period is "specified in the State statute of limitations or under common law," but the definition of "applicable limitations period" and "commencement date" make no reference to common law. Thus, to the extent that a limitations period is established only under common law, § 9658 fails to

manifest a plain meaning applicable in such a circumstance.

C.

When the text of a statute is ambiguous, we "look to other indicia of congressional intent such as the legislative history" to interpret the statute. *CGM, LLC, v. BellSouth Telecomm's, Inc.*, 664 F.3d 46, 53 (4th Cir. 2011). As explained in Part I, *supra*, § 9658 was adopted by Congress to "address[ ] the problem identified in the . . . study [group report]," H.R. Conf. Rep. No. 99–962, at 261, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354. The study group report was equally concerned with statutes of repose and limitations, and with their effect of barring plaintiffs' claims before they are aware of them.

Moreover, Congress's purpose in enacting CERCLA was remedial. Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 Harv. Envtl. L.Rev. 199, 286 (1996) ("CERLCA is not only more remedial than most legislative enactments, it is arguably the most remedial of all federal environmental statutes. . . ."). Indeed,

> [t]he Act is distinctive in the spectrum of federal environmental protection legislation in that the principal focus is remedial and corrective rather than regulatory. CERCLA does not set standards for prospective compliance by industry but essentially is a tort-like backward-looking statute designed to [clean up] expeditiously abandoned hazardous waste sites and respond to hazardous spills and releases of toxic wastes into the environment.

Id. (quoting William Murray Tabb & Linda A. Malone, *Environmental Law: Cases & Materials* 637 (1992)). Moreover, § 9658 resulted from Congress's additional attempts to ensure adequate remedies, and it furthers CERCLA's remedial goals by preempting state limitation periods that would otherwise bar causes of action when harms lie dormant. We have observed that "CERCLA, as all remedial statutes, must be given a broad interpretation to effect its ameliorative goals." *First United Methodist*, 882 F.2d at 867.

When faced with a remedial statute, our interpretive charge is simple: Employ a "standard of liberal construction [to] accomplish [Congress's] objects." *Urie v. Thompson*, 337 U.S. 163, 180, (1949); *see also Niagara Mohawk Power Corp.*, 596 F.3d at 132 (recognizing the need to liberally construe CERCLA to accomplish congressional objectives); *see also Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc.*, 191 F.3d 409, 416 (4th Cir. 1999) (same). In light of this charge, we reject a reading of § 9658 that excludes application of its provisions to North Carolina's ten-year limitation. Such an interpretation may seem to be textually sound under one possible reading of the statute, but it offers too narrow an approach and one that thwarts Congress's unmistakable goal of removing barriers to relief from toxic wreckage. Refusing to apply § 9658 to statutes of repose allows states to obliterate legitimate causes of action before they exist. Because this is precisely the barrier that Congress intended § 9658 to address, we will not read the statute in a manner that makes it inapplicable in such a circumstance. Doing so cannot be termed an honest attempt to "effectuate Congress's intent."

Accordingly, we hold that the federally required commencement date in § 9658 preempts North Carolina's ten-year limitation on the accrual of real property claims.

In so holding, we join the view articulated by the Ninth Circuit in *McDonald v. Sun*, in which the plaintiffs found themselves in circumstances remarkably similar to those of the landowners in this case. *See* 548 F.3d at 777–78, 783 ("[G]iven the ambiguity of the term 'statute of limitations at the time of the adoption of § [9658], taken alongside the only evidence of Congressional intent, it is evident that the term 'statute of limitations' in § [9658] was intended by Congress to include statutes of repose."). Although the Fifth Circuit delineated an opposing view in *Burlington Northern & Sante Fe Railway Co. v. Poole Chemical Co.*, 419 F.3d 355 (5th Cir.2005), we are unpersuaded by its reasoning. There, the plaintiffs had knowledge of their claim prior to expiration of the state statute of repose. *Id.* at 359–60, 364–65. Thus, as recognized by that court, the "case [did] not involve the delayed discovery . . . which § 9658 was intended to address." *Id.* at 364–65.

D.

Our decision here will likely raise the ire of corporations and other entities that wish to rest in the security of statutes of repose, free from the threat of being called to account for their contaminating acts. They likely will cite the well-known policies underlying such statutes and asseverate that we have ignored them. But we are not ignorant of these policies, nor have we turned a blind eye to their importance.

Repose statutes do not exist simply to protect defendants; they also ensure that cases are processed efficiently. *See United States v. Kubrick*, 444 U.S. 111, 117 (1979) ("[S]tatutes of repose . . . protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise ."). And although our decision removes one potential time barrier to a plaintiff's claim, it does not relax his burden of proof. In cases with latent harms, necessary evidence will disappear as time passes, and intervening causes will complicate efforts to pin costs on one party. Even without the hindrance of an official repose statute, plaintiffs may not be able to establish a cause of action or recover damages. Furthermore, because our decision does nothing to diminish North Carolina's requirement that plaintiffs bring claims within three years of discovery, defendants will not necessarily be endlessly subjected to the possibility of litigation. Finally, our stance goes no further than that contemplated by the study group that Congress commissioned. The Group foresaw that the "legislative balance of the respective rights of potential plaintiffs and defendants," *First United Methodist*, 882 F.2d at 866, reflected in statutes of repose might in this circumstance need to tip in favor of plaintiffs: "The policy of repose expressed in the statute of limitations may be outweighed by the policy of affording the plaintiff a just opportunity to vindicate his rights." Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes–Analysis and Improvement of Legal Remedies pt. 2, at 14 (Comm.

Print 1982). Accordingly, we reaffirm our conclusion that North Carolina's ten-year limitation on the accrual of actions is preempted by § 9658 of CERCLA. In so holding, we simply further Congress's intent that victims of toxic waste not be hindered in their attempts to hold accountable those who have strewn such waste on their land.

IV.

For the foregoing reasons, we reverse the district court's order and remand the case so that the litigation can proceed.

REVERSED AND REMANDED

DAVIS, Circuit Judge, concurring:

"Of course, determining whether a regulation or statute is ambiguous presents a legal question, which we determine de novo." *Humanoids Group v. Rogan*, 375 F.3d 301, 306 (4th Cir. 2004). To say, as our good colleague says in dissent, that the majority's legal conclusion that § 9658 is ambiguous must be "supported by the plain language of the statute itself," *post*, at 26, finds no support in Supreme Court or Fourth Circuit authority. "Plain language" analysis does no such work. *See Watt v. Alaska*, 451 U.S. 259, 266 (1981) ("[T]he plain-meaning rule is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.") (citation and internal quotation marks omitted). Moreover, in any event, as the majority opinion makes clear, "the meaning of statutory language, plain or not, depends on context." *Holloway v. United States*, 526 U.S. 1, 7 (1999) (quotations omitted). Judge Floyd's careful analysis is faithful to this important, overarching principle, and I am pleased to join his fine opinion in full.

THACKER, Circuit Judge, dissenting:

With all due respect to my friends in the majority, I must dissent. The majority essentially concludes § 9658 preempts two categories of state statutes: statutes of limitations and statutes of repose. However, in my view the plain and unambiguous language of § 9658 indicates only statutes of limitations were intended to be preempted. Even if the preemptive effect of § 9658 were susceptible to two interpretations, a presumption against preemption would counsel that we should limit § 9658's preemptive reach to statutes of limitations without also extending it to statutes of repose.

The relevant legislative history underscores this plain reading of the statute, and a plain reading of § 9658 aligns with general, deferential principles of legislative compromise that counsel against a liberal reading of the statute. Accordingly, I would affirm.

I.

Although this case arises in the context of federal preemption, at its core, it is about statutory interpretation. The key issue is whether the phrase "statute of limitations" as used in the 1986 amendments to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), Act of Oct. 27, 1986, Pub. L. No. 99–499, 100 Stat. 1613 ("1986 Amendments"), and codified in 42 U.S.C. § 9658, preempts North Carolina's 10–year statute of repose.

A.

Plain Meaning

As in all matters of statutory interpretation, our starting point is an analysis of the statutory text.

Chris v. Tenet, 221 F.3d 648, 651 (4th Cir. 2000). We must begin by asking "whether the language at issue has a plain and unambiguous meaning . . . ." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). This first step may also be our last: if the statutory language has a plain and unambiguous meaning, "we must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009).

In determining whether the language has a plain and unambiguous meaning, "we consider the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Johnson v. Zimmer*, 686 F.3d 224, 232 (4th Cir.2012) (internal quotation marks omitted). If certain terms are undefined in the relevant statutory provisions, they "are typically interpreted as taking their ordinary, contemporary, common meaning." *Id.* (internal quotation marks omitted).

1.

Language of Section 9658

CERCLA § 9658 governs actions under state law for damages from exposure to hazardous substances, and provides that generally, "the statute of limitations established under State law shall apply . . . ." 42 U.S.C. § 9658(a)(2). But the statute also provides the following exception to this general rule:

> [I]f the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

Id. § 9658(a)(1). Of critical import here, the statute defines the "applicable limitations period" as "the period specified in a *statute of limitations* during which a civil action referred to in subsection (a)(1) of this section may be brought." *Id.* § 9658(b)(2) (emphasis supplied). Similarly, the statute defines the state "commencement date" as "the date specified in a *statute of limitations* as the beginning of the applicable limitations period." *Id.* § 9658(b)(3) (emphasis supplied). The "federally required commencement date" provides an enhanced version of the traditional discovery rule and is defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . were caused or contributed by the hazardous substance . . . ." *Id.* § 9658(b)(4).[1] Thus, § 9658 will preempt state law where a state statute of limitations begins to run before it would have run under the federally required commencement date.

The key question then is whether the meaning of § 9658, by its reference to "statute of limitations," is plain and unambiguous. The majority answers that question by concluding that the phrase "statute of limitations" is ambiguous, and thus encompasses both statutes of limitations and statutes of repose. *Ante* at 16 (determining that " § 9658's text [is] capable of at least two interpretations, preventing it from being straightforwardly categorized as 'plain

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[1] As opposed to a more traditional discovery rule that requires simply knowledge of the injury, the "federally required commencement date" requires both knowledge of the injury *and* its cause. Therefore, this dissent at times uses the term "enhanced discovery rule" to refer to the rule as expressed in the definition of "federally required commencement date."

and unambiguous.' "). The majority's conclusion, however, is not supported by the plain language of the statute itself.

2.

Modern and Historical Context

The difficulty presented in this case springs from the definitions of "statutes of limitations" and "statutes of repose" in use today versus their historical understanding.

Today, we understand a statute of limitations, on the one hand, to be "a procedural device that operates as a defense to limit the remedy available from an existing cause of action." *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 865 (4th Cir. 1989); *see also Black's Law Dictionary* 1546 (9th ed. 2009) (defining statute of limitations as "A law that bars claims after a specified period; specif., a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)."). In other words, a statute of limitations "extinguishes the right to prosecute an accrued cause of action after a period of time." *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 363 (5th Cir. 2005) (internal quotation marks omitted). Statutes of limitations typically begin to run either on the date of the plaintiff's injury, or on the date the injury is first discovered or should have been discovered with reasonable diligence. *See id.*

A statute of repose, on the other hand, "creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *First United Methodist*, 882 F.2d at 866; *see*

also Black's Law Dictionary 1546 (9th ed. 2009) (defining statute of repose as "[a] statute barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury."). A statute of repose "abolishes the cause of action after the passage of time even though the cause of action may not have yet accrued." *Burlington*, 419 F.3d at 363 (internal quotation marks omitted). Statutes of repose typically begin to run after "the occurrence of some event other than the injury which gave rise to the claim[,]" *McDonald v. Sun Oil Co.*, 548 F.3d 774, 779 (9th Cir. 2008) (internal quotation marks omitted), such as an act by a defendant or the manufacture of a product, *see Burlington*, 419 F.3d at 363.

The motivations behind statutes of limitations and statutes of repose are different as well. For example, "[s]tatutes of limitations are motivated by considerations of fairness to defendants and are intended to encourage prompt resolution of disputes by providing a simple procedural mechanism to dispose of stale claims." *First United Methodist*, 882 F.2d at 866. Thus, they can be equitably tolled where, for example, a defendant fraudulently conceals a plaintiff's injury. *Id.* Statutes of repose are motivated by "considerations of the economic best interests of the public as a whole" and reflect "a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists." *Id.* Thus, unlike statutes of limitations, statutes of repose are substantive grants of immunity from liability. *Id.*

But this clear distinction between statutes of limitations and statutes of repose is of modern vintage. Historically, the phrase "statute of repose" encompassed a broad range of time-bar statutes that limited litigation, and "provided peace, or 'repose,' to potential litigants. . . ." *Wenke v. Gehl Co.*, 682 N.W.2d 405, 423 (Wis. 2004); *see also id.* ("Early treatise writers and judges considered time bars created by statutes of limitations, escheat and adverse possession as periods of repose. As the courts began to modify statutory limitations by applying the 'discovery rule,' legislatures responded by enacting absolute statutes of repose." (emphasis omitted) (quoting *Reynolds v. Porter*, 760 P.2d 816, 819–20 (Okla. 1988))).

Indeed, the earliest reference to "statutes of repose" in this circuit appears in *Bartlett v. Ambrose*, 78 F. 839, 842 (4th Cir. 1897), in which we cited the Supreme Court's language in *Pillow v. Roberts*, 54 U.S. 472, 13 How. 477 (1851), proclaiming, "[statutes of limitations] are statutes of repose, and should not be evaded by a forced construction."

Put simply, what we today would call statutes of limitations were historically considered, along with other statutory time-bars, to provide repose to litigants and were thus, generally, statutes of repose. These overlapping definitions, however, have evolved into the distinct definitions we have today.

3.

"Statute of Limitations" in 1986

Using the dictionary definition of "statute of limitations" available to Congress in 1986, it is clear that there is no ambiguity as to the meaning of that term at the time § 9658 was enacted. The Fifth

Edition of *Black's Law Dictionary* (the "Fifth Edition"), the most recent edition available to Congress in 1986 at the time CERCLA was amended to include § 9658, had not yet adopted the separate, modern definitions for both "statutes of limitations" *and* "statutes of repose," but was nonetheless in accord with our modern understanding where it mattered.

The Fifth Edition of *Black's Law Dictionary* defined "statute of limitations" as follows:

> A statute prescribing limitations to the right of action on certain described causes of action or criminal prosecutions; that is, declaring that no suit shall be maintained on such causes of action, nor any criminal charge be made, unless brought within a specified period of time after the right accrued. Statutes of limitation are statutes of repose, and are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced. In criminal cases, however, a statute of limitation is an act of grace, a surrendering by sovereign of its right to prosecute. Also sometimes referred to as "statutes of repose."

Black's Law Dictionary 835 (5th ed. 1979).[2] This definition is clearly restricted to time limitations that begin to run after the right to bring the cause of action accrues, that is, after the injury or its

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[2] As noted, we now define a statute of limitations as "[a] law that bars claims after a specified period; specif., a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." *Black's Law Dictionary* 1546 (9th ed. 2009).

discovery, as opposed to after a predetermined period of time, regardless of whether the action otherwise accrues. It, thus, confirms that statutes of limitations were but a subset of statutes of repose and were therefore "sometimes referred to as 'statutes of repose.'" *Id.*

Notably, this definition does not adopt the inverse proposition that all statutes of repose are also statutes of limitation. Therefore, based on the definition available to Congress at the time of the 1986 Amendments, it is clear that Congress necessarily did not intend to include statutes of repose as within the definition of "statutes of limitations."

At the time of the enactment of § 9658 in 1986, then, the only possible ambiguity may have been the meaning of "statute of repose" and whether that term had fully matured into its modern definition. But Congress chose not to include "statute of repose" in § 9658, and thus we need not trouble ourselves with what Congress may have thought it meant.[3]

B.

The North Carolina Statute

After discerning the plain meaning of § 9658, we must decide whether that plain meaning preempts the application of North Carolina General Statute

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[3] Indeed, the study group commissioned by Congress to provide recommendations for the 1986 Amendments clearly understood statutes of repose to be different and distinct from statutes of limitations, as discussed *infra*, and other treatises recognized the distinction at least as early as 1987. *See Black's Law Dictionary* 1546 (9th ed. 2009) (quoting 54 C.J.S. *Limitations of Actions* § 4 (1987)).

§ 1–52(16) to Appellants' state law claim. As explained, in 1986, statutes of limitations were understood to be statutes that limited the right to maintain an action based on when the injured party accrued the right. North Carolina's three-year statute of limitations is just such a restriction and is preempted by § 9658. North Carolina's 10–year statute of repose is not; therefore, it survives beyond the 1986 Amendments.

North Carolina General Statute § 1–52(16) contains both a statute of limitations and a statute of repose. The first sentence of § 1–52(16) provides a three-year statute of limitations for personal injuries and property damages based on a traditional form of the discovery rule. N.C. Gen. Stat. § 1–52(16) ("Within three years an action . . . for personal injury or physical damage to claimant's property, the cause of action . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs.").

Section 1–52(16) also clearly provides a substantive 10–year statute of repose that declares "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." *Id.* § 1–52(16).

But only the three-year provision specifies a time period to bring a cause of action *after* the right has accrued by operation of the discovery rule. The 10–year provision specifies a time restriction *regardless* of whether the right to bring the cause of action could have otherwise accrued. Thus, only the former three-year provision falls within the definition of "statute of

limitations" available to Congress in 1986. *See Black's Law Dictionary* 835 (5th ed. 1979) (defining "statute of limitations" as "[a] statute . . . declaring that no suit shall be maintained . . . unless brought within a specified period of time after the right accrued"). Therefore, only the three-year provision may be considered in order to determine North Carolina's "applicable limitations period." *See* 42 U.S.C. § 9658(b)(2) (defining "applicable limitations period" as "the period specified in a statute of limitations").

Section 9658 preempts state law where state law does not accord plaintiffs the benefit of the federally required commencement date found in § 9658(b)(4). Because North Carolina's three-year provision imposes the earlier, traditional discovery rule to commence the applicable limitations period, and not the commencement date mandated by § 9658, § 9658 preempts North Carolina's statute of limitations, but not its statute of repose.

In contrast, although § 9658 is clearly applicable to preempt the running of North Carolina's statute of limitations, any application to North Carolina's statute of repose is untenable. A simple attempt to map § 9658 onto the North Carolina statute of repose illustrates the point. To trigger § 9658(a)(1), the state "commencement date" must be "earlier than the federally required commencement date." 42 U.S.C. § 9658(a)(1) ("[I]f the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date. . . ."). Importantly, the commencement date is defined as

the *beginning* of the period in which a civil action may be brought. *See id.* § 9658(b)(2)-(3).[4] But the North Carolina statute of repose does not provide a beginning or "commencement date" as that term is defined. Rather, it provides an outer limit, after which no cause of action may accrue. Because North Carolina's statute of repose does not create the beginning of the applicable limitations period, § 9658 cannot graft neatly—or at all—onto the North Carolina statute of repose so as to preempt its enforcement.

C.

Legislative History

Given the plain meaning of the statute, we need not look to legislative history. But, even if we did, the legislative history of § 9658 also clearly supports the conclusion that Congress was aware that statutes of limitations were a distinct category of time-bar statutes and specifically chose only to preempt those statutes and not other statutory time bars such as statutes of repose.

As a part of the initial enactment of CERCLA in 1980, Congress commissioned a study group of expert lawyers "to determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment. . . ." CERCLA, Pub. L. No. 96–510, § 301(e)(1), 94 Stat. 2767 (1980). The study group

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[4] The North Carolina statute of limitations establishes the beginning of that period as the point at which "bodily harm . . . or physical damage . . . becomes apparent or ought reasonably to have become apparent. . . ." N.C. Gen. Stat. § 1–52(16).

responded with a detailed report and recommendations for improving remedies under CERCLA. *See* Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies (Comm. Print 1982) (the "301(e) Report").

The 301(e) Report contained ten categories of recommendations, the ninth of which included recommendations for "Statutes of Limitations." The 301(e) Report outlined the rationale for implementing an enhanced discovery rule in CERCLA actions, *id.* at 28–30, and provided its recommendation, *id.* at 240–41. The 301(e) Report's recommendation with regard to statutes of limitations, in its entirety, was as follows:

> A small number of states still follow the so-called traditional rule that the cause of action accrues from the time of exposure. Another small number of states has not as yet clearly adopted either the traditional or the discovery rule. Since many of the hazardous wastes are carcinogens, mutagens, teratogens or substances with delayed impact on different organs or the central nervous system, the latency period for the appearance of injury or disease is likely to be extended for thirty years or more. In states that have not clearly adopted the discovery rule (i.e., that the cause of action accrues from the time the plaintiff discovered or reasonably should have discovered the injury or disease) the cause of action will usually be time barred when the plaintiff discovers his hurt. The Study Group recommends that all states that have not

> already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause. The Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows that he has one.

Id.

Two key takeaways can be culled from the 301(e) Report's recommendation: (1) an enhanced discovery rule should apply to statutes of limitations; and (2) statutes of repose are separate and distinct from statutes of limitations.

First, the 301(e) Report clearly informed Congress that an enhanced discovery rule should apply to statutes of limitations in all states for injuries caused by hazardous substances. In essence, the 301(e) Report took the position that a plaintiff's statute of limitations should not begin to run until the plaintiff both discovers or should have discovered the injury, *and* realizes that his or her injury was caused by the hazardous substance. 301(e) Report at 241 ("The Study Group recommends that all states that have not already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause."). Congress agreed. In enacting § 9658, Congress implemented this exact formulation of the discovery rule in its definition of the "federally required commencement date." 42 U.S.C. § 9658(b)(4)(A).[5]

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[5] The "federally required commencement date" is defined, in relevant part, as "the date the plaintiff knew (or reasonably

Second, the 301(e) Report put Congress on notice that statutes of limitations are distinct time-bars, separate from statutes of repose, even if they have the same effect. The 301(e) Report recommended to Congress not only that the aforementioned enhanced discovery rule should be applied to state statutes of limitations, but also recommended that state statutes of repose be repealed. 301(e) Report at 241 ("The Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows that he has one."). By the plain language of § 9658, Congress disagreed.

Based on the 301(e) Report, Congress was clearly on notice that statutes of repose, separate and distinct from statutes of limitations, could prohibit recovery by certain plaintiffs, and yet chose to leave § 9658 completely replete of any reference to such statutes.

D.

Legislative Compromise

The majority notes that CERCLA is a remedial statute and thus deserves broad construction to accomplish its objectives. *Ante* at 17. This is true. But the plain meaning of the statute and the role of legislative compromise restrain the application of the remedial canon of statutory interpretation. *See 3550 Stevens Creek Assocs. v. Barclays Bank of Cal.*, 915

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should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4)(A).

F.2d 1355, 1363 (9th Cir. 1990) (noting that even if courts give CERCLA a "broad interpretation to accomplish its remedial goals[,]" courts must nonetheless "reject a construction that [CERCLA] on its face does not permit, and the legislative history does not support."); Blake A. Watson, *Liberal Construction of CERCLA under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing too Far?*, 20 Harv. Envtl. L. Rev. 199, 300–01 (1996) ("It has been firmly established that the fact that a statute is 'highly remedial in nature' and 'entitled to a liberal construction' nevertheless 'does not justify ignoring plain words of limitation.'") (quoting *MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944)); *id.* at 301 ("[T]he remedial purpose canon has diminished utility when the interpretive issue focuses on provisions of CERCLA that are the product of compromise. Such compromises can be found in both CERCLA's text and its enactment history.").[6]

In passing the 1986 Amendments, Congress did not arm toxic tort plaintiffs with every possible advantage nor remove every obstacle from their path to recovery. Rather, the 1986 Amendments reflected the process of legislative compromise based, in part, on the 301(e) Report's analysis and recommendations. As mentioned, the 301(e) Report

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[6] Even if CERCLA, as enacted in 1980, was the product of an 11th-hour compromise and, thus, also lends itself to a liberal construction for that reason as the majority seems to imply, *ante* at 4, 17–19, the provision at issue in this case, § 9658, was passed years later in 1986 after careful study and deliberation. The circumstances surrounding § 9658's passage certainly do not invite departure from its plain language.

was commissioned to evaluate existing statutory and common law remedies for environmental harms caused by hazardous substances and to provide corresponding recommendations. CERCLA, Pub. L. No. 96–510, § 301(e)(1), (4), 94 Stat. 2767 (1980).

But Congress did not implement every recommendation supplied by the 301(e) Report. In fact, quite to the contrary. For example, in its "Ninth Recommendation," the 301(e) Report recommended a variety of changes to actions arising under state law. 301(e) Report, 240–51. The 301(e) Report recommended states adopt an enhanced discovery rule, *id.* at 241; repeal statutes of repose, *id.*; adopt liberal joinder rules for plaintiffs, *id.* at 242; adopt a system of joint and several liability with a *de minimis* exception, *id.* at 243; adopt liberal joinder rules for defendants, *id.* at 244; implement their own evidentiary presumptions, *id.* at 245; and adopt a theory of strict liability for hazardous waste activities, *id.* at 245. Congress could have drafted the 1986 Amendments to implement any or all of the 301(e) Report's recommendations by preempting state law wherever it fell short of the 301(e) Report's recommendations. But the *only* revision affecting state law Congress chose to implement in the section explicitly covering state procedural reform was the enhanced discovery rule via the federally required commencement date. *See* 1986 Amendments, Pub. L. No. 99–499, § 203, 100 Stat. 1613 (1986). Notably, Congress was given the opportunity to repeal statutes of repose, but *chose not to.*

That § 9658 reaches state statutes of limitations but not statutes of repose strikes a balance between harmonizing certain procedural matters in toxic tort

cases and allowing states to continue to regulate their own substantive areas of law. It is the prerogative of Congress to strike that balance. *See Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F.3d 1469, 1484 (9th Cir. 1995) (concluding that even when the application of a CERCLA provision leads to "harsh results[,]" courts should not disrupt Congress's balancing of the interests involved).

E.

Presumption Against Preemption

While at its most elemental this case concerns a matter of statutory interpretation, that task arises in the context of federal preemption. "Courts generally apply a presumption against preemption in fields the states traditionally regulate." *Nat'l City Bank of Ind. v. Turnbaugh*, 463 F.3d 325, 330 (4th Cir. 2006). Just as we presume "Congress does not cavalierly pre-empt state-law causes of action[,]" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), we should also presume that Congress does not cavalierly preempt state substantive rights to be free from those state-law causes of action. Even "[f]ederal laws containing a preemption clause [,]" such as § 9658, "do not automatically escape the presumption against preemption." *Id.* Rather, "[w]here the text of a preemption clause is open to more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.' " *Id.* at 335 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

Here, the ability of a state to create a substantive right to be free from liability under its own state tort law is unquestionably a traditional field of state regulation. Therefore, the general presumption against preemption likewise weighs against giving

§ 9658 overly broad preemptive effect. *See Barnes ex rel. Barnes v. Koppers, Inc.*, 534 F.3d 357, 363 (5th Cir. 2008) (discussing the preemptive effect of § 9658 and noting that "[i]f the extent of Congress's preemptive intent is unclear, the presumption favors a finding of limited preemption."); *see generally Marsh v. Rosenbloom*, 499 F.3d 165, 178 (2d Cir. 2007) (concluding CERCLA did not preempt certain Delaware statutes in part because arguments in favor of greater monetary recovery "alone are insufficient to justify displacement of state law").

II.

CERCLA and the 1986 Amendments clearly put a thumb on the scales in favor of assisting plaintiffs who may have suffered injuries due to toxic substances. But where Congress by plain and unambiguous language has indicated how much pressure it wishes to apply in that regard, it is not the duty of this court to press harder and shift that balance. Rather, it is the prerogative of Congress to strike that legislative compromise.

In sum, because I believe the plain language of § 9658 preempts North Carolina's statute of limitations, but not its statute of repose, I would affirm the decision of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

WALDBURGER, et al.,	)	No. 1:11CV39
Plaintiffs.	)	Judge Graham C. Mullen
v.	)	
CTS CORPORATION,	)	
Defendant.	)	

Feb. 6, 2012

ORDER

This matter is before the court upon the memorandum and recommendation of United States Magistrate Dennis L. Howell, filed October 4, 2011. The parties were advised that pursuant to 28 U.S.C. § 636(b)(1)(C), written objections to the memorandum and recommendation must be filed within 14 days after service of the memorandum. The Plaintiffs timely filed an objection to the memorandum and recommendation on October 21, 2011, and the Defendant submitted a response to the objection on November 7, 2011.

After an independent and thorough review of the magistrate's memorandum, Plaintiffs' objections thereto, and a *de novo* review of the record, the court concludes that the recommendation to grant Defendant's Motion to Dismiss is correct and in

accordance with law. The court specifically notes that the magistrate judge's analysis of CERCLA's preemption of state statutes of limitations, as opposed to statutes of repose, is accurate and well-reasoned. The court has reviewed the Ninth Circuit's holding to the contrary in *McDonald v. Sun Oil Co.*, 548 F.3d 774, 782 (9th Cir.2008), in which the court held that CERCLA preempted the applicable statute of repose. The court finds the reasoning of that court to be flawed. The plain language of Section 9658 of CERCLA applies only to state statutes of limitations, not statutes of repose. If the language of a statute is clear, the Fourth Circuit has stated that "[o]ur inquiry into Congress' intent is at an end, for if the language is plain and the statutory scheme is coherent and consistent, we need not inquire further." *William v. Gonzales*, 499 F.3d 329, 333 (4th Cir. 2007). It appears that the *McDonald* court created an ambiguity where none existed. Plaintiffs also rely on the Georgia district court's decision in *In re: Camp Lejeune, North Carolina Water Contamination Litigation*, 1:11–md–02218 (September 29, 2011, N.D.Ga.), in support of their argument that CERCLA should preempt the statute of repose in this case. However, the court finds this case to be unpersuasive, particularly since the *Camp Lejeune* court did not hold that statutes of repose were necessarily preempted by § 9658, only that they could be based on the "factual circumstances of each plaintiff's claim." *Camp Lejeune*, p. 23.

Accordingly, the findings and conclusions of the magistrate are accepted and Defendant's Motion to Dismiss is GRANTED.

IT IS THEREFORE ORDERED that the memorandum and recommendation of the magistrate is hereby AFFIRMED.

Signed: February 6, 2012

/s/ Graham C. Mullen

Graham C. Mullen
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:11cv39

WALDBURGER, et al., Plaintiffs.	)	**MEMORANDUM AND RECOMMENDATION**
v.	)	
CTS CORPORATION, Defendant.	)	

Pending before the Court is Defendant's Motion to Dismiss [# 7]. Plaintiffs brought this action against Defendant CTS Corporation asserting a single count of nuisance arising out of the alleged contamination of Plaintiffs' property. Defendant now moves to dismiss the Complaint. The Court Recommends that the District Court **GRANT** the motion [# 7].

I. Background

CTS of Asheville, Inc. was formed in 1959 to manufacture electronics. (Pls.' Compl. ¶¶ 5 & 7.) CTS of Asheville operated a facility in the Asheville area called the Mills Gap Road Electroplating Facility (the "Facility"). (*Id.* ¶ 9.) As part of the process of manufacturing electronics, CTS of Asheville used various toxic solvents, including trichloroethylene

("TCE") at the Facility. (*Id.* ¶¶ 8–9.) CTS of Asheville also stored TCE at the Facility. (*Id.* ¶ 10.)

CTS of Asheville was dissolved in 1983. (*Id.* ¶ 14.) The Facility, however, continued operating for another two years as Defendant CTS Corporation, Asheville Division. (*Id.* ¶ 15.) Defendant CTS Corporation ceased operating the Facility in 1985. (*Id.* ¶ 19.) In 1987, CTS Corporation sold 54 acres of the industrial site where the Facility was located to a partnership, Mills Gap Road Associates. (*Id.* ¶ 23.)

Plaintiffs are all either land owners of property that was formally part of the industrial site CTS Corporation sold to Mills Gap Road Associates or property that is near the former industrial site. (*Id.* ¶ 29.) Plaintiffs contend that their land and ground water is contaminated by the toxic chemicals, including TCE, that CTS Corporation left at the Facility when it sold the property. (*Id.* ¶¶ 29–30.) These chemicals have leached into the air and water. (*Id.* ¶ 33.) In fact, two of the Plaintiff were advised by the EPA in 2009 that their well water contained levels of TCE that were not fit for human consumption. (*Id.* ¶¶ 34–35.)

Subsequently, Plaintiffs brought this action for nuisance against Defendant CTS Corporation. Plaintiffs demand monetary damages, as well as a judgment requiring reclamation of the toxic chemicals and remediation of any environmental harm caused by these chemicals. Defendant now moves to dismiss the Complaint on the ground that the claims are barred by the applicable statute of repose.

II. Legal Standard

The central issue for resolving a Rule 12(b)(6) motion is whether the complaint states a plausible claim for relief. *See Francis v. Giacomelli*, 588 F.3d 186, 189 (4th Cir. 2009). In considering a defendant's motion to dismiss, the Court accepts the allegations in the complaint as true and construes them in the light most favorable to plaintiff. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir.2009); *Giacomelli*, 588 F.3d at 190–92. Although the Court accepts well-pled facts as true, it is not required to accept "legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement. . . ." *Consumeraffairs.com*, 591 F.3d at 255; *see also Giacomelli*, 588 F.3d at 189.

The complaint need not contain "detailed factual allegations," but must contain sufficient factual allegations to suggest the required elements of a cause of action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964–65 (2007); *see also Consumeraffairs.com*, 591 F.3d at 256. "[A] formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1965. Nor will mere labels and legal conclusions suffice. *Id.* Rule 8 of the Federal Rules of Civil Procedure "demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949 (2009).

The complaint is required to contain "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U .S. at 570, 127 S.Ct. at 1974; *see also Consumeraffairs.com*, 591 F.3d at 255. "A claim has

facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. ___, 129 S.Ct. at 1949; *see also Consumeraffairs.com*, 591 F.3d at 255. The mere possibility that the defendants acted unlawfully is not sufficient for a claim to survive a motion to dismiss. *Consumeraffairs.com*, 591 F.3d at 256; *Giacomelli*, 588 F.3d at 193. Ultimately, the well-pled factual allegations must move a plaintiff's claims from possible to plausible. *Twombly*, 550 U.S. at 570, 127 S.Ct. at 1974; *Consumeraffairs.com*, 591 F.3d at 256.

III. Analysis

In order to prevail on their claim for nuisance under North Carolina law, Plaintiffs must demonstrate "an unreasonable interference with the use and enjoyment of their property." *Jordon v. Foust Oil Co., Inc.*, 447 S.E.2d 491, 498 (N.C. Ct. App. 1994). The three year statute of limitations set forth in N.C. Gen. Stat. § 1–52 applies to a claim of nuisance. *Wilson v. McLeod Oil Co.*, 398 S.E.2d 586, 511 (N.C. 1990); *Robertson v. City of High Point*, 497 S.E.2d 300, 302 (N.C. Ct. App. 1998); *Crawford v. Boyette*, 464 S.E.2d 301, 303 (N.C. Ct. App. 1995); *James v. Clark*, 454 S.E.2d 826, 830 (N.C. Ct. App. 1995). In addition, N.C. Gen. Stat. § 1–52(16) provides that:

> Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever

> event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

The provisions of N.C. Gen. Stat. § 1–52(16), including the ten year statute of repose, apply to nuisance actions asserting personal injury or physical damage to a plaintiff's property. *See Wilson*, 398 S.E.2d at 513; *Hodge*, 631 S.E.2d at 144–45; *Crawford*, 464 S.E.2d at 303–4. "The plain language of the statute indicates that in cases involving property damage, no cause of action may be brought more than ten years after the defendant's last act or omission." *Hodge*, 631 S.E.2d at 145. "A complaint which seeks to impose liability upon a previous landowner or operator for adjoining land contamination constitutes an action for physical damage to claimant's property, and is thus governed by N.C. Gen.Stat. § 1–52(16)." *Id.*

Here, Plaintiffs seek to impose liability on Defendant CTS Corporation, as the former landowner, for the contamination of its former land and the adjoining land. The last possible act or omission by Defendant CTS Corporation that could give rise to a cause of action occurred in 1987 when it sold the property. Because Defendant CTS Corporation's last act or omission occurred more than ten years before Plaintiffs filed this action, Plaintiffs claims are barred by the statute of repose contained in N.C. Gen. Stat. § 1–52(16). *See Wilson*, 398 S.E.2d at 597; *Hodge*, 631 S.E.2d at 145.

Plaintiffs, however, contend that N.C. Gen. Stat. § 1–52(16) is unconstitutional under the open courts provision of the North Carolina Constitution. Article

I, section 18 of the North Carolina Constitution provides that:

> Courts shall be open. All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

Although neither the North Carolina Supreme Court nor the Court of Appeals has ever directly addressed whether the ten year statute of repose contained in N.C. Gen. Stat. § 1–52(16) is constitutional as applied to a nuisance claim based on the contamination of land, North Carolina courts have upheld shorter statute of reposes for other causes of action. *See Lamb v. Wedgewood S. Corp.*, 302 S.E.2d 868 (N.C. 1983) (upholding six year statute of repose contained in N.C. Gen. Stat. § 1–50(5)); *Tetterton v. Long Mfg.*, 332 S.E.2d 67, 70–75 (1985) (upholding the six year statute of repose contained in N.C. Gen. Stat. § 1–50(6)); *Garrett v. Winfree*, 463 S.E.2d 411, 416–17 (N.C. Ct. App. 1995) (upholding constitutionality of N.C. Gen. Stat. § 1–15(c)). Based on the reasoning of the North Carolina Supreme Court in *Lamb*, the Court is convinced that the ten year statute of repose contained in N.C. Gen. Stat. § 1–52(16) is not unconstitutional under the open courts provision of the North Carolina Constitution. The ten year statute of repose is not so short as to effectively abolish all potential claims. *See Lamb*, 302 S.E.2d at 882 n. 7; *Tetterton*, 332 S.E.2d at 72–73.[1]

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[1] The statute of repose, however, would likely not apply to a latent disease like cancer that a Plaintiff later contracts as a result of exposure to toxic chemicals in their drinking water. *See Jones v. United States*, 751 F.Supp.2d 835, 840–842

Accordingly, the Court finds that the application of the statute of repose to Plaintiffs' claim is not unconstitutional under the open courts provision of the North Carolina Constitution.

Finally, the statute of repose contained in N.C. Gen. Stat. § 1–52(16) is not preempted by the Comprehensive Environmental Response Compensation and Liability Act. Section 9658 provides that in cases brought under state law for property damage caused by exposure to any hazardous substance or contaminant released from a facility, the federal commencement date for the accrual of the statute of limitations shall apply. 42 U.S.C. § 9658(a)(1). Thus, CERCLA preempts the state accrual date in environmental cases. *Id.; see also Minnesota ex rel. Northern Pacific Ctr., Inc.*, 723 F. Supp. 2d 1123, 1128 (D. Minn. 2010); *Kowalski v. Goodyear tire & Rubber Co.*, 841 F.Supp. 104, 107 (W.D.N.Y. 1994). The clear language of the statute, however, is limited to a state's statute of limitations. *See* 42 U.S.C. §§ 9658(b)(2) & (3); *Burlington Northern & Sante Fe Ry. Co. v. Poole Chem. Co., Inc.*, 419 F.3d 355, 362–63 (5th Cir. 2005) (holding that the plain language of Section 9658 does not apply to a statute of repose); *Evans v. Walter Indus., Inc.*, 579 F. Supp. 2d 1349, 1364 (S.D. Ala. 2008) (same); *but see McDonald v. Sun Oil Co.*, 548 F.3d 774, 782 (9th Cir. 2008) (holding that Section 9658 did not preempt the applicable statute of repose).

(E.D.N.C. 2010). Plaintiffs, however, concede that they are not asserting any claims for personal injury. (Pls.' Resp. Def.'s Mot. Dismiss at p. 12). Accordingly, the Court need not address this issue.

A statute of limitations and a statute of repose are two distinct types of statutes. *Id.* at 865–66. "A statute of repose is a substantive limitation, and is a condition precedent to a party's right to maintain a lawsuit." *Tipton & Young Const. Co., Inc. v. Blue Ridge Structure Co.*, 446 S.E.2d 603, 605 (N.C. Ct. App. 1994); *see also Dawson v. N.C. Dep't of Env't and Natural Res.*, 694 S.E.2d 427, 430 (N.C. Ct. App. 2010). In contrast, a statute of limitations is a "procedural device that operates as a defense to limit the remedy available from an existing cause of action." *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 865 (4th Cir. 1989). Because the plain language of Section 9658 provides that it only preempts a state statute of limitations, the Court finds that the statute does not preempt the statute of repose contained in N.C. Gen. Stat. § 1–52(16). *See id.* ("[W]hen the language of a statute is clear, there is no need to rely on its legislative history."). Accordingly, Plaintiffs' claim for nuisance is barred by the applicable statute of repose and Plaintiffs' Complaint is subject to dismissal. The Court, therefore, **RECOMMENDS** that the District Court **GRANT** the Motion to Dismiss [# 7] and dismiss the Complaint in its entirety.

IV. Conclusion

The Court **RECOMMENDS** that the District Court **GRANT** the Motion to Dismiss and dismiss the Complaint in its entirety.

Signed: October 4, 2011
/s/Dennis L. Howell
Dennis L. Howell
United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Péter Waldburger
Asheville, NC

Sandra Ratcliffe
Asheville, NC

Lee Ann Smith
Arden, NC

Tom "Bud" Pinner, IV and
Patricia Pinner
Asheville, NC

Tom "Buddy" Pinner, III and
Madeline Pinner
Asheville, NC

Hans and Wilma Momkes
Asheville, NC

Walter Dockins, Jr. and
Autumn Dockins
Skyland, NC

William Clark Lisenbee
Asheville, NC

Dan and Lori Murphy
Asheville, NC

Robert Aversano
Asheville, NC

Daniel L Murphy
Asheville, NC

Case No. 1:11cv39

COMPLAINT

Laura A Carson
Asheville, NC

Glen and Gina Horecky
Asheville, NC

Renee Richardson and David Bradley
Asheville, NC

Byron and Ramona Hovey
Asheville, NC

and

Peter Tatum MacQueen, IV and Bethan MacQueen
Asheville, NC

Plaintiffs,

vs.

CTS CORPORATION
c/o Its Statutory Agent
RICHARD G CUTTER
ELKHART, IN

Defendant.

Now come the Plaintiffs, Peter Waldburger, Sandra Ratcliffe, Lee Ann Smith, Tom "Bud" Pinner, IV, Patricia Pinner, Tom "Buddy" Pinner, III, Madeline Pinner, Hans Momkes, Wilma Momkes, Walter Dockins, Jr., Autumn Dockins, William Clark Lisenbee, Dan Murphy, Lori Murphy, Robert Aversano, Daniel Murphy, Laura A Carson, Glen Horecky, Gina Horecky, Byron Hovey, Ramona Hovey, Renee Richardson, David Bradley, Bethan MacQueen and Peter Tatum MacQueen, IV

(hereinafter "Plaintiffs") by and through counsel, and for their complaint allege and aver as follows:

I. PARTIES AND JURISDICTION

1) At all times herein mentioned Plaintiffs were and now are residents of Buncombe County and the State of North Carolina.

2) At all times relevant Defendant, CTS CORPORATION, (hereinafter "CTS Corp.") was a corporation organized and existing under the laws of the State of Delaware, with its principal place of business Elkhart, Indiana, and was licensed to do business in the State of North Carolina.

3) Jurisdiction exists pursuant to 28 U.S.C. 1332 in that there is diversity of citizenship between the Plaintiffs and the Defendant, and the amount in controversy is in excess of SEVENTY FIVE-THOUSAND DOLLARS ($75,000.00), exclusive of interest and costs.

4) Pursuant to 28 U.S.C. § 1391(a)(2) and (3), venue is proper in this Court, because a substantial part of the events or omissions giving rise to the claim occurred in North Carolina, and because the Court has personal jurisdiction over the defendant in this district.

II. FACTUAL ALLEGATIONS

5) CTS of Asheville, Inc. ("The corporation") was a corporation existing under the laws of the State of North Carolina formed on or about April 16, 1959 and was dissolved on December 29, 1983.

6) A true and correct copy of the Articles of Incorporation of CTS of Asheville, Inc. is attached hereto and incorporated by reference as Exhibit "1."

7) One of the expressed purposes for forming CTS of Asheville, Inc., as stated in the Articles of Incorporation was:

> To manufacture, construct, fabricate, produce, buy, purchase, acquire, deal in, sell and otherwise dispose of, both at wholesale and retail, electronics, electromechanical, electrical, radio, radar, telephone, television, and all kinds of parts, articles, devices, supplies, accessories, attachments and merchandise.

Exhibit "1" at paragraph 3(a).

8) As part of the operations of CTS of Asheville, Inc. various toxic solvents, including by not limited to trichloroethylene (TCE), cyanide, chromium VI, and lead were used in the manufacturing process for the electrical and electronic components that were manufactured by the corporation.

9) Prior to 1986, CTS of Asheville of Asheville, Inc. used the all of the above listed chemicals and other volatile organic compounds in its operations at the Mills Gap Road Electroplating Facility.

10) As of 1981, CTS of Asheville, Inc. stored 495,000 gallons of trichloroethylene at the Mills Gap Road facility and had shipped no trichloroethylene off site for processing.

11) A true and correct copy of CTS of Asheville, Inc.'s "1981 Hazardous Waste Generators Annual (Part A) Report" signed by Norman Lewis on February 4, 1982 is attached hereto and incorporated by reference as Exhibit "2."

12) In 1982, CTS of Asheville, Inc. reported a decrease in its storage of trichloroethylene at the Mills Gap Road facility to 330,000 gallons and

claimed to have shipped an additional 5,070,000 pounds of trichloroethylene to "Armegdon [sic] Chemical" in Durham, North Carolina. Exhibit "3."

13) A true and correct copy of CTS of Asheville, Inc.'s "Hazardous Waste Generators Annual [for calendar year 1982] (Part A) Report" signed by Norman Lewis on February 22, 1983 is attached hereto and incorporated by reference as Exhibit "3."

14) On December 29, 1983, CTS of Asheville, Inc. was dissolved as a North Carolina corporation. Attached as Exhibit "4" and incorporated by reference is a true and correct copy of the Articles of Dissolution filed by CTS of Asheville, Inc. with the North Carolina Secretary of State.

15) After the dissolution of CTS of Asheville, Inc., the corporation continued to operate as CTS Corp., Asheville Division. A true and correct copy of CTS Corp., Ashville Division's "Hazardous Waste Generators Annual (Part A) Report" signed by Ronnie Lewis on February 10, 1984 is attached hereto and incorporated by reference as Exhibit "5."

16) In 1983 the total amounts of trichloroethylene stored or shipped by CTS of Asheville, Inc. and/or CTS Corp., Inc. were greatly reduced. By February 10, 1984, CTS Corp., Asheville Division, reported having only 3960 pounds of trichloroethylene on hand, and only shipped 4,630 pounds of trichloroethylene to Environmental Recycling in 1983 (formally Armageddon Chemical of Durham, North Carolina).

17) In its various filings with the State of North Carolina, CTS Corp. and/or its former subsidiary CTS of Asheville, Inc. have failed to account for over

1,000,000 pounds of the spent halogenated solvent, trichloroethylene.

18) The chemicals CTS Corp. left on the site of its electroplating facility were the personal property of CTS, Corp.

19) CTS Corp. ceased operating the Mills Gap Road Electroplating Facility on or about November 1, 1985.

20) In late 1986 or early 1987, CTS Corp. began an effort to try to sell the real property it owned and formerly operated as the Mills Gap Road Electroplating Facility.

21) As part of its efforts to sell the Mills Gap Road Electroplating Facility and surrounding land, CTS Corp. represented to realtors and the community that the site "has been rendered in an environmentally clean condition."

22) A true and correct copy of Marvin Gobles, P.E. letter to Stan Greenberg of January 27, 1987 is attached hereto and incorporated by reference as Exhibit "6."

23) On or about June 25, 1987 CTS Corp. agreed to sell the 54 acres of the Mills Gap Road industrial site to a partnership, Mills Gap Road Associates. Mills Gap Road Associates, a general partnership, agreed to purchase the 54 acre site from CTS Corp. As part of the agreement CTS Corp provided specific warranties stating the lack of environmental contamination on the property.

24) A true and correct copy of the "Contract of Sale of Realty" between CTS Corp and Mills Gap Road Associates is attached hereto and incorporated by reference as Exhibit "7."

25) CTS Corp., as part of the "Contract of Sale of Realty" specifically warranted as follows:

> Seller [CTS Corp.] warrants that the Property will be the subject of an environmental audit, the results of which will be provided to the Buyer. If the results of the environmental audit indicate the presence of contaminants on or under the Property, in amounts that would exceed any applicable governmental rules or regulations, Buyer shall have the option of terminating this Contract without any further liability if the Seller decides not to undertake to remedy the identified contamination.

Exhibit "7." at 2, ¶ 5.

26) The sale of the land was finalized on December 23, 1987.

27) Mills Gap Road Associates only purchased the real property formally owned by CTS Corp. and various plant machines. Mills Gap Road Associates did not purchase any toxic chemicals from CTS, Corp.

28) The partnership never purchased, nor did it intend to purchase, any of the spent halogenated solvent, trichloroethylene, created and owned by CTS Corp. CTS Corp. left its personal property, over 1,000,000 pounds of spend halogenated dangerous toxic chemicals at the Mills Gap Road site.

29) Plaintiffs are either residents of the property formally owed by CTS of Asheville, Inc. and Mills Gap Road Associates, or are land owners near the former CTS of Asheville, Inc. site whose ground water and land is being contaminated by the various toxic substances owned by CTS, Corp.

30) By 2002, Defendant CTS Corp. received actual notice that the toxic substances it left at its former Mills Gap Road facility were leaching out and contaminating the ground water in the vicinity and seeping on to the property of the abutting land owners as well as releasing toxic fumes into the air.

31) Through the present CTS Corp. has been and continues to be aware that its toxic substances continue to leach into the ground water and air surrounding its former Mills Gap Road facility and continue to contaminate the environment including the land owned and occupied by the Plaintiffs.

III. COUNT I: NUISANCE

32) Plaintiffs reallege and reaver each and every allegation set forth in the foregoing paragraphs as if fully rewritten herein.

33) The toxic chemicals abandoned by CTS Corp., have begun to leach out into the air and water in the surrounding community and are continuing to contaminate the air, land and water in the vicinity of Mills Gap Road.

34) On November 23, 2009, Plaintiffs David Bradley and Renee Richardson were advised by the United States Environmental Protection Agency, Region 4 that their well contained TCE and DCE (cis-1,20dicholroethene). Specifically the letter stated:

> TCE was initially detected at a concentration of 842 micrograms per liter (ug/L); cis-1,2-dicholoroethene (DCE) was also detected at a concentration of 65.8 ug/L. The concentration of TCE in the sample was too high for calibration of the instrument and thus was designated with a

> qualifier of "E," meaning "exceeds calibration range."

Letter from EPA to David Bradley dated November 23, 2009, attached hereto and incorporated by reference as Exhibit "8."

35) The well water supplied to the Richardson and Bradley was not fit for human consumption. Indeed the EPA could not even determine the true concentration of the toxins in the water. The EPA informed the family,

> The probable result is that the concentrations of the TEC in this diluted sample are likely biased low. Regardless of the variability in concentration, all of these results are able the RAL ["Removal Action Level"] and MCL ["Maximum Contaminant Level"], supporting the need for EPA to supply an alternate drinking water supply to you and your family.

Exhibit "8" at 1.

36) The other Plaintiffs in this action live in the vicinity of the Richardson and Bradley residence. All of the Plaintiffs have been and continue to be exposed to the CTS Corp. toxins via contact from air, land and water.

37) The actions for CTS Corp. constitute a continuous nuisance under the law of North Carolina.

38) Plaintiffs have been and are continuing to be harmed by the nuisance created by CTS Corp. for reasons including but not limited to the diminution in the value of their real property. In addition the Plaintiffs are afraid for their health and safety and that of their family members.

WHEREFORE: the Plaintiffs demand judgment against the Defendant requiring reclamation of the 1,000,000 pounds of toxic chemical contaminants belonging to CTS Corp., remediation of the environmental harm caused by the CTS Corp.'s toxic chemicals as well as monetary damages in an amount that will fully compensate them for all the losses and damages they have suffered, or and will suffer in the future as allowed by the applicable law; for trial by a jury; and for costs, fees and other further relief that the Court may deem just and proper.

/s/Joseph L. Anderson
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